BULKY SUB

CASE# 04-2-36048-0 SEA

SEGMENT 3 **OF** 3

at 65, or in that court's construction of it. It is true that the concept of vagueness has been used to give 'breathing space' to 'First Amendment Freedoms,' see Amsterdam, Note, The Void-For-Vagueness Doctrine in the Supreme Court, 109 U. of Pa. L. Rev. 67, but it is also true, as that same commentator has well stated, that '(v)agueness is not an extraneous ploy or a judicial deus ex machina.' Id., at 88. There is, in other words, 'an actual vagueness component in the vagueness decisions.' Ibid. And the test is whether the law in question has established standards of guilt sufficiently ascertainable that men of common intelligence need not guess at its meaning. Connally v. General Constr. Co., 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322; Winters v. New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840. Laws that have failed to meet this standard are, almost without exception, those which turn on language calling for the exercise of subjective judgment, unaided by objective norms. E.g., United States v. L. Cohen Grocery Co., 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516 ('unreasonable' charges); Winters v. New York, supra ('so massed as to becomes vehicles for inciting'); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098 ('sacrilegious'). No such language is to be found here.

Ambiguity in the present statute can be made to appear only at the price of strained reading of the State Court's opinion. As construed, the statute contains two types of prohibition relating to solicitation. The first prohibits such groups as the NAACP and the Educational Defense Fund, 'their officers, members, affiliates, voluntary workers ***467** and attorneys' from soliciting legal business for 'their attorneys.' [FN13] And the state court made it clear that 'their attorneys' referred to 'attorneys whom they (the NAACP and the Fund) pay, and who are subject to their directions.' 202 Va., at 164, 116 S.E.2d, at 72. This is the practice with which the state court's opinion is predominantly concerned and which gave rise to the intensive consideration by that court of the relations between petitioner and its legal staff. Surely, there is no element of uncertainty involved in this prohibition. The state court has made it plain that the solicitation involved is not the advocacy of litigation in general or in particular but only that involved in the handling of litigation by petitioner's own paid and controlled staff attorneys. Compare Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430.

FN13. As a corollary, attorneys are prohibited, by the law as construed, from accepting employment by petitioner in suits solicited by petitioner.

****356** The second prohibition in the statute is the solicitation by petitioner of legal business for 'any particular attorneys' or the channeling of litigation which it supports to 'any other attorneys,' whether or not they are petitioner's staff attorneys. This language of the state court, coupled primarily with this Court's own notion that Chapter 33 in defining 'agents' has departed from common-law principles, leads the majority to conclude that the statute may have been interpreted as precluding organizations such as petitioner from simply advising prospective litigants to engage for themselves particular attorneys, whether members of the organization's legal staff or not.

Surely such an idea cannot be entertained with respect to the state court's discussion of the NAACP and its staff attorneys. The record is barren of all evidence that any litigant, in the type of litigation with which this case is concerned, ever attempted to retain for his own account ***468** one of those attorneys, and indeed strongly indicates that such an arrangement would not have been acceptable to the NAACP so long as such a lawyer remained on its legal staff. And the state court's opinion makes it clear that that court was not directing itself to any such situation.

Nor do I think it may reasonably be concluded that the state court meant to preclude the NAACP from recommending 'outside' attorneys to prospective litigants, so long as it retained no power of direction over such lawyers. Both in their immediate context and in light of the entire opinion and record below, it seems to me very clear that the phrases 'or any particular attorneys' and 'or any other attorneys' both have reference only to those 'outside' attorneys with respect to whom the NAACP or the Defense Fund bore a relationship equivalent to that existing between them and 'their attorneys.' [FN14] It savors almost of disrespect to the Virginia Supreme Court of Appeals, whose opinion manifests full awareness of the considerations that have traditionally marked the line between professional and unprofessional

conduct, to read this part of its opinion otherwise. Indeed the ambiguity which this Court now finds quite evidently escaped the notice of both petitioner and its counsel for they did not so much as suggest such an argument in their briefs. Moreover, the kind of approach that the majority takes to the statute is quite inconsistent with the precept that our duty is to construe legislation, if possible, 'to save and not to destroy.' National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30, 57 S.Ct. 615, 620, 81 L.Ed. 893, and cases cited; United States v. Rumely, 345 U.S. 41, 47, 73 S.Ct. 543, 546, 97 L.Ed. 770.

FN14. The full text of those portions of the state court opinion in which these phrases appear is quoted in footnote 9 of the majority opinion, p. 334.

But even if the statute justly lent itself to the now attributed ambiguity, the Court should excise only the ambiguous part of it, not strike down the enactment in ***469** its entirety. Our duty to respect state legislation, and to go no further than we must in declining to sustain its validity, has led to a doctrine of separability in constitutional adjudication, always followed except in instances when its effect would be to leave standing a statute that was still uncertain in its potential application. [FN15] See Smith v. California, 361 U.S. 147, 151, 80 S.Ct. 215, 217, 4 L.Ed.2d 205. Given the 'ambiguity' view of the Court, the separability doctrine should at least have been applied ****357** here, since what would then remain of Chapter 33 could not conceivably be deemed ambiguous. [FN16] In my view, however, the statute as construed below is not ambiguous at all.

FN15. Of course, if we refuse to sustain one part of a state statute, the state court on remand may decide that the remainder of the statute can no longer stand, but insofar as that conclusion is reached as a matter of state law, it is of no concern to us.

FN16. Cf. Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117, in which the state law condemned the displaying of a red flag for any of three purposes and this Court sustained the validity of the law as to two of these purposes but struck it down for vagueness as to the third.

V.

Since the majority has found it unnecessary to consider them, only a few words need be said with respect to petitioner's contentions that Chapter 33 deprives it of property without due process of law and denies it equal protection.

The due process claim is disposed of once it appears that this statute falls within the range of permissible state regulation in pursuance of a legitimate goal. Pp. 349--355, supra.

As to equal protection, this position is premised on the claim that the law was directed solely at petitioner's activities on behalf of Negro litigants. But Chapter 33 as it comes to us, with a narrowing construction by the state court that anchors the statute firmly to the common law and to the court's own independently existing supervisory ***470** powers over the Virginia legal profession, leaves no room for any finding of discriminatory purpose. Petitioner is merely one of a variety of organizations that may come within the scope of the long-standing prohibitions against solicitation and unauthorized practice. It would of course be open to the petitioner, if the facts should warrant, to claim that Chapter 33 was being enforced discriminatorily as to it and not against others similarly circumstanced. See Yick Wo v. Hopkins, 118 U.S. 356, 373--374, 6 S.Ct. 1064, 1072--1073, 30 L.Ed. 220. But the present record is barren of any evidence suggesting such unequal application, and we may not presume that it will occur. People of State of New York ex rel. Lieberman v, Van De Carr, 199 U.S. 552, 562--563, 26 S.Ct. 144, 146--147, 50 L.Ed. 305; Douglas v. Noble, 261 U.S. 165, 170, 43 S.Ct. 303, 305, 67 L.Ed. 590. [FN17]

FN17. It has been suggested that the state law may contain an invidious discrimination because it treats those organizations that have a pecuniary interest in litigation (for example, an insurance company) differently from those that do not. But surely it cannot be said that this distinction, which is so closely related to

> traditional concepts of privity, lacks any rational basis. The importance of the existence of a pecuniary interest in determining the propriety of sponsoring litigation has long been recognized at common law, both in England, see Findon v. Parker, 11 M. & W. 675, 152 Eng.Rep. 976 (Exch.1843), and in the United States, see, e.g., Dorwin v. Smith, 35 Vt. 69; Vaughan v. Marable, 64 Ala. 60, 66--67; Smith v. Hartsell, 150 N.C. 71, 63 S.E. 172, 22 L.R.A., N.S., 203. The distinction drawn by the Virginia law is not without parallel in the requirement that in the absence of a statute or rule a suit in a federal court attacking the validity of a law may be brought only by one who is in immediate danger of sustaining some direct and substantial injury as the result of its enforcement, and not by one who merely 'suffers in some indefinite way in common with people generally,' or even in common with members of the same race or class. Masschusetts v. Mellon, 262 U.S. 447, 487--488, 43 S.Ct. 597, 601, 67 L.Ed. 1078. See McCabe v. Atchison, T. & S.F.R. Co., 235 U.S. 151, 162, 35 S.Ct. 69, 71, 59 L.Ed. 169. And of course the motives of the Virginia legislators in enacting Chapter 33 are beyond the purview of this Court's responsibilities. Fletcher v. Peck, 6 Cranch 87, 130, 3 L.Ed. 162; see Arizona v. California, 283 U.S. 423, 455, 51 S.Ct. 522, 526, 75 L.Ed. 1154; cf. Tenney v. Brandhove, 341 U.S. 367, 377, 71 S.Ct. 783, 788, 95 L.Ed. 1019

I would affirm.

371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405

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112 S.Ct. 698
502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711, 60 USLW 4075
(Cite as: 502 U.S. 279, 112 S.Ct. 698)

H
Briefs and Other Related Documents

Supreme Court of the United States

Barbara J. NORMAN, et al., Petitioners,
v.
Dorothy REED et al.
COOK COUNTY OFFICERS ELECTORAL BOARD, et al., Petitioners,
v.
Dorothy REED et al.

Nos. 90-1126, 90-1435.

Argued Oct. 7, 1991.
Decided Jan. 14, 1992.

Action was brought challenging objections to placement of new party on ballot. The Circuit Court, Cook County, affirmed election board ruling in part. The Supreme Court of Illinois reversed in part. The Supreme Court, Justice Souter, held that: (1) action was not moot; (2) prohibition on use of name of political party in one district after it has been used in another district was unconstitutional; (3) signature requirement which effectively required more signatures to get on the ballot in a multidistrict political subdivision than were required to get on the statewide ballot was unconstitutional; but (4) requirement that party seeking to be on the ballots in suburban Cook County and in the city of Chicago obtain 25,000 signatures within the city and 25,000 within the suburban area was not unconstitutional.

Affirmed in part and reversed in part, and remanded.

Justice Scalia filed dissenting opinion.

Justice Thomas took no part in the consideration or decision of this case.

West Headnotes

[1] Constitutional Law ⇐46(1)
92k46(1) Most Cited Cases
Action involving challenge to statutory requirements for political party to gain place on the ballot would be considered even though the election had been concluded, as the issue was one capable of repetition yet evading review.

[2] Constitutional Law ⇐46(1)
92k46(1) Most Cited Cases
Challenge to constitutionality of statute setting forth number of signatures for party to get place on ballot was not moot, even though the election had been held, where stay order had permitted party's candidate to run and some had received sufficient votes to give the party a place on the ballot in future elections should it be determined that they were properly on this ballot.

[3] Constitutional Law ⇐82(8)
92k82(8) Most Cited Cases

[3] Constitutional Law ⇐274.2(2)
92k274.2(2) Most Cited Cases
Citizens have a constitutional right to create and develop new political parties, derived from the First and Fourteenth Amendments. U.S.C.A. Const.Amends. 1, 14.

[4] Constitutional Law ⇐82(8)
92k82(8) Most Cited Cases

[4] Constitutional Law ⇐274.2(2)
92k274.2(2) Most Cited Cases
To the degree that a state would thwart the interest of like-minded voters to gather in pursuit of common political ends by limiting access of new parties to the ballot, there must be a corresponding interest sufficiently weighty to justify the limitation, and any severe restriction must be narrowly drawn to advance a state interest of compelling importance. U.S.C.A. Const.Amends. 1, 14.

[5] Elections ⇐21
144k21 Most Cited Cases
State may prohibit candidates running for office in one subdivision from adopting the name of party established in another if they are not in any way affiliated with that party. Ill.S.H.A. ch. 46, ¶ 10-2.

[6] Constitutional Law ⇐82(8)
92k82(8) Most Cited Cases

[6] Constitutional Law ⇐274.2(2)

92k274.2(2) Most Cited Cases
[6] Elections ⚿21
144k21 Most Cited Cases
State statute construed as prohibiting the use of the name of a political party established in one district for candidates in another district was broader than necessary to serve state's asserted interest in prohibiting candidates from adopting the name of a political party with which they are not affiliated, and violated First and Fourteenth Amendment rights of those forming new party. U.S.C.A. Const.Amends. 1, 14; Ill.S.H.A. ch. 46, ¶ 10-5.
[7] Constitutional Law ⚿82(8)
92k82(8) Most Cited Cases
[7] Constitutional Law ⚿274.2(2)
92k274.2(2) Most Cited Cases
[7] Elections ⚿22
144k22 Most Cited Cases
Statute which effectively required new political party to gain more signatures on ballot petitions in multidistrict subdivision of the state than were required to obtain a place on the statewide ballot violated First and Fourteenth Amendment rights of members of new party. U.S.C.A. Const.Amends. 1, 14; Ill.S.H.A. ch. 46, ¶ 10-2.
[8] Constitutional Law ⚿82(8)
92k82(8) Most Cited Cases
[8] Constitutional Law ⚿274.2(2)
92k274.2(2) Most Cited Cases
State interest in insuring electoral support for new party in every district within a multidistrict political subdivision in which the party seeks to be on the ballot could not justify requirement of requiring a greater number of signatures for ballot in multidistrict subdivision than would be required to get on the statewide ballot. U.S.C.A. Const.Amends. 1, 14; Ill.S.H.A. ch. 46, ¶ 10-2.
[9] Constitutional Law ⚿82(8)
92k82(8) Most Cited Cases
[9] Constitutional Law ⚿274.2(2)
92k274.2(2) Most Cited Cases
[9] Elections ⚿22
144k22 Most Cited Cases
In the absence of claim that division of county into separate district was unconstitutional, requirement that new party seeking to be on the ballots in city and suburban area obtain 25,000 signatures in each of two areas was not unconstitutional and candidate's success in obtaining signatures in city district was not sufficient condition for running candidates in suburban districts. U.S.C.A. Const.Amends. 1, 14; Ill.S.H.A. ch. 46, ¶ 10-2.

Syllabus [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***279** Illinois citizens wishing to establish a "new political party" may field candidates for statewide office after collecting the signatures of 25,000 eligible voters, and they may field candidates solely for offices in a large "political subdivision" upon collecting the signatures of 25,000 subdivision voters. Ill.Rev.Stat., ch. 46, § 10-2. However, when a subdivision comprises large separate districts from which some of its officers are elected, party organizers seeking to fill such offices must collect 25,000 signatures from each district. *Ibid.* A new political party becomes an "established political party" if it receives 5% of the vote in the next election, but a party that has not engaged in a statewide election can become "established" only in a subdivision where it has fielded candidates. Petitioners sought to expand the Harold Washington Party (HWP), an established party in Chicago, to Cook County, a subdivision comprising two electoral districts: a city district and a suburban district. Before the 1990 elections, they presented the county with a petition containing 44,000 signatures from the city district and 7,800 signatures from the suburban district and a slate of candidates for both at-large and district-specific seats. Respondent Reed and other voters (collectively, Reed) filed objections with the Cook County Officers Electoral Board (Board). The Board rejected Reed's claim that § 10-5--which prohibits a new party from bearing an established party's name--prevented petitioners from using the HWP name, holding that § 10-5's purpose was to prevent persons not affiliated with a party from latching on to its name, thus causing voter confusion and denigrating party cohesiveness, and that these dangers were not present here since one Evans--the only HWP candidate to run in Chicago's most recent election--had authorized petitioners to use the name. The Board also found that petitioners' failure to gather 25,000 signatures from the suburbs disqualified the HWP candidates wishing to run for

suburban-district seats, but not those running for city-district and countywide offices, and that petitioners' failure to designate HWP candidates for judicial seats did not disqualify the entire slate. The County Circuit Court affirmed the Board's ***280** ruling on the use of the HWP name, but held that the entire slate was doomed under § 10-2 by the failure to obtain sufficient suburban-district signatures and, alternatively, the failure to list any judicial candidates. The State Supreme Court held that § 10-5 prohibited petitioners from using the HWP name and that, under § 10-2, the failure to gather enough suburban-district signatures disqualified the entire slate. This Court granted petitioners' application for a stay, permitting them to run in the election. Although no HWP candidates were elected, several received over 5% of the vote, which would qualify the HWP as an "established political party" within all or part of the county in the next election.

Held:

1. The controversy is not moot even though the 1990 election is over, both because it is "capable of repetition, yet evading review," and because the results of that election will entitle the HWP to enter the next election as an established party in all or part ****701** of the county so long as its candidates were entitled to their places on the 1990 ballot. Pp. 704-705.

2. Sections 10-2 and 10-5, as construed by the State Supreme Court, violate petitioners' right of access to the county ballot. Pp. 705-708.

(a) The right of citizens to create and develop new political parties derives from the First and Fourteenth Amendments and advances the constitutional interest of likeminded voters to gather in pursuit of common political ends, thus enlarging all voters' opportunities to express their own political preferences. See, *e.g., Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230. Therefore, a State may limit new parties' access to the ballot only to the extent that a sufficiently weighty state interest justifies the restriction. Any severe restriction must be narrowly drawn to advance a state interest of compelling importance. See *id.,* at 184, 186, 99 S.Ct., at 990, 991. P. 705.

(b) The State Supreme Court's inhospitable reading of § 10-5 is far broader than is necessary to serve the asserted state interest in preventing misrepresentation and electoral confusion. That interest could be served merely by requiring candidates to get formal permission from an established party to use its name, a simple expedient for fostering an informed electorate without suppressing small parties' growth. Reed offers no support for her apparent assumption that petitioners did not obtain such permission from the Chicago HWP, and the State Supreme Court itself found unworthy of mention any theory that Evans lacked authority under state law to authorize the HWP name's use. Pp. 705-706.

(c) Similarly, disqualifying all HWP candidates because of the failure to collect 25,000 signatures in each district is not the least restrictive ***281** means of advancing Illinois' interest in limiting the ballot to parties with demonstrated public support, since it would require petitioners to collect twice as many signatures to field candidates in the county as they would need if they wished to field candidates for statewide office. See *Illinois Bd. of Elections v. Socialist Workers Party, supra.* Even if Illinois could have constitutionally required petitioners to demonstrate a distribution of support throughout Cook County, it could have done so without also raising the overall quantum of needed support above what the State expects of new statewide parties. Moreover, it requires elusive logic to show a serious state interest in demanding a distribution of support for new local parties when the State deems it unimportant to require such support for new statewide parties. Pp. 707-708.

(d) Nonetheless, requiring candidates for suburban-district offices to obtain 25,000 nominating signatures from the suburbs does not unduly burden their right to run under the HWP name. Just as the State may not cite the HWP's failure in the suburbs as reason for disqualifying its candidates in the city district, neither may the HWP cite its success in the city district as a sufficient condition for running candidates in the suburbs. P. 708.

3. The issue whether the HWP's failure to field judicial candidates doomed the entire slate is remanded to the State Supreme Court to consider in

the first instance. Pp. 708-709.

Affirmed in part, reversed in part, and remanded.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, BLACKMUN, STEVENS, O'CONNOR, and KENNEDY, JJ., joined. SCALIA, J., filed a dissenting opinion, *post*, p. 709. THOMAS, J., took no part in the consideration or decision of the cases.

Robert E. Pincham, Jr., Chicago, Ill., for petitioners in No. 90-1126.

Kenneth L. Gillis, Chicago, Ill., Burton S. Odelson, Evergreen Park, Ill., for petitioners in No. 90-1435.

Gregory A. Adamski, Chicago, Ill., for respondents.

****702 *282** Justice SOUTER delivered the opinion of the Court.

In these consolidated cases, we review a decision of the Supreme Court of Illinois barring petitioners in No. 90-1126 (petitioners) from appearing under the name of the Harold Washington Party on the November 1990 ballot for Cook County offices. We affirm in part, reverse in part, and remand for further proceedings not inconsistent with this opinion.

I

Under Illinois law, citizens organizing a new political party must canvass the electoral area in which they wish to field candidates and persuade voters to sign their nominating petitions. Organizers seeking to field candidates for statewide office must collect the signatures of 25,000 eligible voters, [FN1] Ill.Rev.Stat., ch. 46, § 10-2 (1989), and, if they wish to run candidates solely for offices within a large "political subdivision" like Cook County, they need 25,000 signatures from the subdivision. *Ibid.* If, however, the subdivision itself comprises large separate districts from which some of its officers are elected, party organizers seeking to fill such offices must collect 25,000 signatures from each district. *Ibid.* [FN2] If the ***283** organizers collect enough signatures to place their candidates on the ballot, their organization becomes a "new political party" under Illinois law, and if the party succeeds in gathering 5% of the vote in the next election, it becomes an "established political party," freed from the signature requirements of § 10-2. *Ibid.* A political party that has not engaged in a statewide election, however, can be "established" only in a political subdivision where it has fielded candidates. A party is not established in Cook County, for example, merely because it has fared well in Chicago's municipal elections.

FN1. More precisely, they must collect the signatures of 25,000 voters or 1% of the number of voters at the preceding statewide general election, whichever is less. Ill.Rev.Stat., ch. 46, § 10-2 (1989). Given the State's population, the 25,000 signature requirement applies.

FN2. The statute reads in relevant part:
"In the case of a petition to form a new political party within a political subdivision in which officers are to be elected from districts and at-large, such petition shall consist of separate components for each district from which an officer is to be elected. Each component shall be circulated only within a district of the political subdivision and signed only by qualified electors who are residents of such district. Each sheet of such petition must contain a complete list of the names of the candidates of the party for all offices to be filled in the political subdivision at large, but the sheets comprising each component shall also contain the names of those candidates to be elected from the particular district. Each component of the petition for each district from which an officer is to be elected must be signed by qualified voters of the district equalling in number not less than 5% of the number of voters who voted at the next preceding regular election in such district at which an officer was elected to serve the district. The entire petition, including all components, must be signed by a total of qualified voters of the entire political subdivision equalling in number not less than 5% of the number of voters who voted at the next preceding regular election in

> such political subdivision at which an officer was elected to serve the political subdivision at large."
> The statute caps the 5% requirement for both district and subdivision petitions at 25,000 signatures, the number effectively required on statewide petitions. Cook County and its districts are so large that this cap applies to each.

The Harold Washington Party (HWP or Party), named after the late mayor of Chicago, has been established in the city of Chicago since 1989. Petitioners were the principal organizers of an effort to expand the Party by establishing it in Cook County, and, as candidates for county office, they sought to run under the Party name in the November 1990 elections.

***284** Cook County comprises two electoral districts: the area corresponding to the city of Chicago (city district) and the rest of the county (suburban district). [FN3] Although some ****703** county officials are elected at large by citizens of the entire county, members of the county board of commissioners are elected separately by the citizens of each district to fill county board seats specifically designated for that district. While certain petitioners wished to run for offices filled by election at large, others sought to capture the county board seats representing the city and suburban districts of Cook County.

> FN3. These are the current districts of Cook County. We have learned that in a November 1990 referendum, the voters of Cook County adopted an ordinance providing for the division of the county by 1994 into 17 districts, each of which will send one commissioner to the county board. This Court has been unable to secure any official record of the new ordinance, however. In any event, the parties have not treated this issue as having any bearing on our disposition of these cases, and we do not see how it could have.

Because the Party had previously engaged solely in Chicago municipal elections, petitioners were obliged to qualify as a "new party" in Cook County in order to run under the Party name. Accordingly, § 10-2 required them to obtain 25,000 nominating signatures in order to designate candidates for the at-large offices. And since petitioners wished to field candidates for the county board seats allocated to the separate districts, they also had to collect 25,000 signatures from each district. Petitioners gathered 44,000 signatures on the city-district component of their petition, but only 7,800 on the suburban component.

After petitioners filed the petition with the county authorities and presented their slate of candidates for both at-large and district-specific seats, respondent Dorothy Reed and several other interested voters (collectively, Reed) filed objections to the slate with the Cook County Officers Electoral Board (Board or Electoral Board). The Board rejected most ***285** of Reed's claims. First, it dismissed her contention that, because there was already an established political party named the "Harold Washington Party" in the city of Chicago, petitioners could not run under that name for the various county offices. Reed relied on the provision of Illinois law that a "new political party," which petitioners sought to form, "shall not bear the same name as, nor include the name of any established political party...." Ill.Rev.Stat., ch. 46, § 10-5 (1989). The Board, however, suggested that a literal reading of § 10-5 would effectively forbid a political party established in one political subdivision to expand into others, and held that the provision's true purpose was "to prevent persons who are not affiliated with a party from 'latching on' to the popular party name, thereby promoting voter confusion and denigrating party cohesiveness." The Board found no such dangers here, as Timothy Evans, the only HWP candidate to run in Chicago's most recent municipal election, had authorized petitioners to use the Party name.

The Board also rejected Reed's claim that petitioners had failed to gather enough nominating signatures to run as a party for any Cook County office. While the Board found that their failure to gather 25,000 signatures from the suburbs disqualified those who wished to run for the suburban-district commissioner seats, it held that this failure was no reason under § 10-2 to disqualify the candidates running under the Party name for city-district and countywide offices. The Board observed that construing the statute to disqualify the

entire Cook County slate on this basis would advance no valid state interest and would raise serious constitutional concerns.

Finally, the Board rejected Reed's claim that, under § 10-2, petitioners' failure to designate Party candidates for any of the judicial seats designated for either the city district, the suburban district, or the county at large disqualified the entire slate of candidates running under the Party name for all ***286** county offices. [FN4] It decided, among other things, that § 10-2 did not apply because the judgeships at issue were not offices of the ****704** same "political subdivision" as nonjudicial offices within Cook County.

> FN4. Reed based her argument on what the parties call the "complete slate requirement" of § 10-2. The parties occasionally use the same term in their discussion of a separate issue, whether petitioner's failure to collect sufficient signatures in the suburban district voids their entire slate. For clarity, we avoid using the term altogether.

On appeal, the Circuit Court of Cook County affirmed the Board's ruling on the use of the HWP name, but on grounds different from the Board's. It ruled that while Evans had no statutory power to authorize the use of the Party name, § 10-2 implicitly confined the scope of § 10-5 to cases where two parties seeking to use the same name coexist in the same political subdivision. Since Cook County and the city of Chicago are separate subdivisions, the Circuit Court found no violation of the Election Code.

The Circuit Court nonetheless held that under the plain language of § 10-2, petitioners' failure to obtain 25,000 signatures for the suburban-district candidates doomed the entire slate, and it alternatively held that petitioners' failure to list Party candidates for judicial office compelled the same result. For these two independent reasons, the Circuit Court reversed the Board. [FN5]

> FN5. The Circuit Court also held that petitioners' failure to gather 25,000 signatures for the candidates running under the Party name for office in the Metropolitan Water Reclamation District disqualified those candidates, but not the rest of the slate, because the Water Reclamation District was a separate political subdivision from Cook County. This ruling was not appealed to the Illinois Supreme Court and is not before this Court.

On review, the Supreme Court of Illinois held in a brief written order that § 10-5 prohibited petitioners from using the HWP name, and that their failure to gather enough signatures for the candidates in the suburban-district races disqualified the entire slate. It expressly declined "to discuss other points raised on the appeal" and thus chose not to address ***287** the effect of petitioners' failure to list candidates for county judgeships. Three of the court's seven members dissented on the ground that the majority's construction of Illinois law irrationally and unconstitutionally suppressed the development of new political parties. The majority justices indicated that they would issue an explanatory opinion, but they never have. [FN6]

> FN6. Three of the four justices in the majority have left the court since the date of the order.

Petitioners then applied for a stay from Justice STEVENS, who, in his capacity as Circuit Justice, ordered the mandate of the Illinois Supreme Court to be "stayed or, if necessary, recalled" pending further review by this Court. Order in No. A-309 (Oct. 22, 1990). On October 25, 1990, the full Court granted petitioners' application for stay pending the filing and disposition of a petition for certiorari, 498 U.S. 931, 111 S.Ct. 333, 112 L.Ed.2d 298, thereby effectively reviving the Electoral Board's decision and permitting petitioners to run under the Party name in the November 6, 1990, Cook County election. According to the undisputed representation of the Board, see Brief for Petitioners in No. 90-1435, p. 10, while none of the HWP candidates was elected, several did receive over 5% of the vote, thus fulfilling, if the election stands, a necessary and apparently sufficient condition for the Party's qualification as an "established political party" within all or part of Cook County at the next election.

In due course, petitioners filed a petition for certiorari in No. 90-1126, and the Board, a respondent in that action, filed its own petition in No. 90-1435. [FN7] We granted each on May 20, 1991. 500 U.S. 931, 111 S.Ct. 2051, 114 L.Ed.2d 457 (1991).

FN7. Under Illinois practice, if the Board's decision is appealed, it joins the prevailing party in support of its own decision.

II

[1] We start with Reed's contention that we should treat the controversy as moot because the election is over. We should ***288** not. Even if the issue before us were limited to petitioners' eligibility to use the Party name on the 1990 ballot, that issue ****705** would be worthy of resolution as " 'capable of repetition, yet evading review.' " *Moore v. Ogilvie,* 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969). There would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints if we should fail to resolve the constitutional issues that arose in 1990.

[2] The matter before us carries a potential of even greater significance, however. As we have noted, the 1990 electoral results would entitle the HWP to enter the next election as an established party in all or part of Cook County, freed from the petition requirements of § 10-2, so long as its candidates were entitled to the places on the ballot that our stay order effectively gave them. This underscores the vitality of the questions posed, even though the election that gave them life is now behind us.

III

[3][4] For more than two decades, this Court has recognized the constitutional right of citizens to create and develop new political parties. The right derives from the First and Fourteenth Amendments [FN8] and advances the constitutional interest of like-minded voters to gather in pursuit of common political ends, thus enlarging the opportunities of all voters to express their own political preferences. See *Anderson v. Celebrezze,* 460 U.S. 780, 793-794, 103 S.Ct. 1564, 1572-1573, 75 L.Ed.2d 547 (1983); *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 184, 99 S.Ct. 983, 990, 59 L.Ed.2d 230 (1979); *Williams v. Rhodes,* 393 U.S. 23, 30- 31, 89 S.Ct. 5, 10-11, 21 L.Ed.2d 24 (1968). To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently ***289** weighty to justify the limitation, see *Anderson, supra,* 460 U.S., at 789, 103 S.Ct., at 1570, and we have accordingly required any severe restriction to be narrowly drawn to advance a state interest of compelling importance. See *Socialist Workers Party, supra,* 440 U.S., at 184, 186, 99 S.Ct., at 990, 991. By such lights we now look to whether § § 10-2 and 10-5, as construed by the Supreme Court of Illinois, violate petitioners' right of access to the Cook County ballot.

FN8. As in *Anderson v. Celebrezze,* 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983), "we base our conclusions directly on the First and Fourteenth Amendments and do not engage in a separate Equal Protection Clause analysis. We rely, however, on the analysis in a number of our prior election cases resting on the Equal Protection Clause of the Fourteenth Amendment." *Id.,* at 786-787, n. 7, 103 S.Ct., at 1568-1569, n. 7.

A

Reversing the judgment of the Circuit Court, the State Supreme Court held, under § 10-5, that the Cook County candidates could not claim to represent the HWP because there already was a party by that name in the city of Chicago. The court gave no reasons for so concluding beyond declaring that "petitioner [s'] use of the Harold Washington Party name in their petition ... violate[d] the provisions of section 10-5," which, the court noted, "prohibits use of the name of an established political party." Thus, the issue on review is not whether the Chicago HWP and the Cook County HWP are in some sense "separate parties," but whether and how candidates running for county office may adopt the name of a party established only in the city.

While the Board based its answer to this question

on a determination that the city HWP had authorized petitioners to use the Party name, the State Supreme Court's order seems to exclude the very possibility of authorization, reading the prohibition on the "use of the name of an established political party" so literally as to bar candidates running in one political subdivision from ever using the name of a political party established only in another. As both the dissent below and the opinion of the Board suggest, ****706** however, this Draconian construction of the statute would obviously foreclose the development of any political party lacking the resources to run a statewide campaign. Just as obviously, § 10-5, as the State's highest court apparently construed it, ***290** is far broader than necessary to serve the State's asserted interests.

[5][6] To prevent misrepresentation and electoral confusion, Illinois may, of course, prohibit candidates running for office in one subdivision from adopting the name of a party established in another if they are not in any way affiliated with the party. The State's interest is particularly strong where, as here, the party and its self-described candidates coexist in the same geographical area. But Illinois could avoid these ills merely by requiring the candidates to get formal permission to use the name from the established party they seek to represent, a simple expedient for fostering an informed electorate without suppressing the growth of small parties. Thus, the State Supreme Court's inhospitable reading of § 10-5 sweeps broader than necessary to advance electoral order and accordingly violates the First Amendment right of political association. See *Anderson, supra,* 460 U.S., at 793-794, 103 S.Ct., at 1572-1573; *Williams, supra,* 393 U.S., at 30-34, 89 S.Ct., at 10-12.

For her part, when Reed argues that the county Party, led by R. Eugene Pincham, is "different from" the Party established in the city of Chicago under the leadership of Timothy Evans, she may indeed be suggesting that the city Party failed to authorize the Cook County candidates to use the Party name. But Reed offers no support at all for that assumption, which stands at odds with what few relevant facts the record reveals. The Electoral Board found that Timothy Evans, the Party's most recent mayoral candidate in the city of Chicago, had specifically authorized petitioners' use of the Party name in Cook County. While acknowledging that Evans was not the statutory chairman of the Chicago Party, the Board ruled, and Reed does not dispute, that Evans, "as the only candidate of the Chicago HWP," was "the only person empowered by the Election Code to act in any official capacity for the HWP." We have no authoritative ruling on Illinois law to the contrary, and Reed advances no legal argument for the insufficiency of Evans' authorization.

***291** To be sure, it is not ours to say that Illinois law lacks any constitutional procedural mechanism that petitioners might have been required to, but did not, follow before using the Party name. Our review of § 10-2 reveals the possibility that Illinois law empowers a newly established party's candidate or candidates (here, Evans) merely to appoint party "committeemen," whose authority to "manage and control the affairs" of the party might include an exclusive right to authorize the use of its name outside the party's original political subdivision. It seems unlikely, however, that the Supreme Court of Illinois had such reasoning in mind. Any limitation on Evans's power to authorize like-minded candidates to use the Party name would have had to arise under § 10-2, whereas the order below held simply that petitioners' use of the Party name "violate[d] the provisions of section 10-5." In any event, it is not this Court's role to review a state-court decision on the basis of inconclusive and unargued theories of state law that the state court itself found unworthy of mention. [FN9]

> FN9. Reed did seem to make a version of this argument in her brief to the Illinois Supreme Court. See Brief for Appellees Reed et al. in No. 70833 (Sup.Ct.Ill.), pp. 20-21. Moreover, in the one sentence that it devotes to the topic, the Circuit Court makes a similar observation: "While Timothy C. Evans was the only candidate of the Harold Washington Party, his only power, pursuant to § 10-2 of the Election Code, was the ability to appoint interim committeemen." See App. to Pet. for Cert. in No. 90-1435, p. 19a. Nonetheless, these passages are inadequate to prove that the Illinois Supreme Court adopted the argument, particularly since

Reed arguably waived it by not raising it in her original "Objector's Petition" to the Electoral Board. See App. 14-15. There, she claimed only that petitioners' use of the Party name violated § 10-5.

****707** B

As an alternative basis for prohibiting petitioners from running together under the Party name, the Supreme Court of Illinois invoked the statutory requirement of § 10-2 that "[e]ach component of the petition for each district ... be signed by [25,000] qualified voters of the district...." The ***292** court apparently held that disqualification of a party's entire slate of candidates is the appropriate penalty for failing to meet this requirement, and it accordingly treated petitioners' failure to collect enough signatures for their suburban-district candidates as an adequate ground for disqualifying every candidate running under the HWP name in Cook County.

This is not our first time to consider the constitutionality of an Illinois law governing the number of nominating signatures the organizers of a new party must gather to field candidates in local elections. In *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979), we examined Illinois's earlier ballot-access scheme, under which party organizers seeking to field candidates in statewide elections were (as they still are) effectively required to gather 25,000 signatures. See § 10-2. At that time, the statute separately required those organizing new parties in political subdivisions to collect signatures totaling at least 5% of the number of people voting at the previous election for offices of that subdivision. In the city of Chicago, the subdivision at issue in *Socialist Workers Party,* the effect of that provision was to require many more than 25,000 signatures. Although this Court recognized the State's interest in restricting the ballot to parties with demonstrated public support, the Court took the requirement for statewide contests as an indication that the more onerous standard for local contests was not the least restrictive means of advancing that interest. *Id.,* at 186, 99 S.Ct., at 991.

The Illinois Legislature responded to this ruling by amending its statute to cap the 5% requirement for "any district or political subdivision" at 25,000 signatures. Thus, if organizers of a new party wish to field candidates in a large county without separate districts, and if 5% of the number of voters at the previous county election exceeds 25,000, the party now needs to gather only 25,000 signatures.

***293** [7] Under the interpretation of § 10-2 rendered below, however, Illinois law retains the constitutional flaw at issue in *Socialist Workers Party* by effectively increasing the signature requirement applicable to elections for at least some offices in subdivisions with separate districts. Under that interpretation, the failure of a party's organizers to obtain 25,000 signatures for each district in which they run candidates disqualifies the party's candidates in all races within the subdivision. Thus, a prerequisite to establishing a new political party in such multidistrict subdivisions is some multiple of the number of signatures required of new statewide parties. Since petitioners chose to field candidates for the county board seats allocated to the separate districts and, as required by state law, used the "component" (*i.e.,* district-specific) form of nominating petition, the State Supreme Court's construction of § 10-2 required petitioners to accumulate 50,000 signatures (25,000 from the city district and another 25,000 from the suburbs) to run any candidates in Cook County elections. The State may not do this in the face of *Socialist Workers Party,* which forbids it to require petitioners to gather twice as many signatures to field candidates in Cook County as they would need statewide.

[8] Reed nonetheless tries to skirt *Socialist Workers Party* by advancing what she claims to be a state interest, not addressed by the earlier case, in ensuring that the electoral support for new parties in a multidistrict political subdivision extends to every district. Accepting the legitimacy of the interest claimed would not, however, excuse ****708** the requirement's unconstitutional breadth. Illinois might have compelled the organizers of a new party to demonstrate a distribution of support throughout Cook County without at the same time raising the overall quantum of needed support above what the State expects of new parties fielding candidates only for statewide office. The State might, for example, have required some minimum number of signatures from each of the component districts

while maintaining the total ***294** signature requirement at 25,000. But cf. *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969). While we express no opinion as to the constitutionality of any such requirement, what we have said demonstrates that Illinois has not chosen the most narrowly tailored means of advancing even the interest that Reed suggests.

Nor is that the only weakness of Reed's rationale. Illinois does not require a new party fielding candidates solely for statewide office to apportion its nominating signatures among the various counties or other political subdivisions of the State. See § 10-2; *Communist Party of Illinois v. State Bd. of Elections,* 518 F.2d 517 (CA7), cert. denied, 423 U.S. 986, 96 S.Ct. 394, 46 L.Ed.2d 303 (1975). Organizers of a new party could therefore win access to the statewide ballot, but not the Cook County ballot, by collecting all 25,000 signatures from the county's city district. But if the State deems it unimportant to ensure that new statewide parties enjoy any distribution of support, it requires elusive logic to demonstrate a serious state interest in demanding such a distribution for new local parties. Thus, as in *Socialist Workers Party,* the State's requirements for access to the statewide ballot become criteria in the first instance for judging whether rules of access to local ballots are narrow enough to pass constitutional muster. Reed has adduced no justification for the disparity here. [FN10]

> FN10. To an extent, history explains the anomaly. *Moore v. Ogilvie,* 394 U.S. 814, 89 S.Ct. 1493, 23 L.Ed.2d 1 (1969), together with the Seventh Circuit's decision in *Communist Party of Illinois v. State Bd. of Elections,* 518 F.2d 517 (1975) , left the ballot-access requirements for statewide elections less stringent, for the first time, than the requirements for any local ballot. These were the same legal developments, in fact, that led to the anomaly at issue in *Illinois Bd. of Elections v. Socialist Workers Party,* 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). Yet, as we noted there, an explanation is not the same as a justification. *Id.,* at 187, 99 S.Ct., at 991; see also *id.,* at 189, 99 S.Ct., at 993 (STEVENS, J., concurring in part and concurring in judgment); *id.,* at 190-191, 99 S.Ct., at 992-993 (REHNQUIST, J., concurring in judgment). "Historical accident, without more, cannot constitute a compelling state interest." *Id.,* at 187, 99 S.Ct., at 991.

***295** C

[9] Up to this point, the positions of petitioners and the Board have coincided. They diverge on only one matter: whether requiring the candidates for the suburban-district commissioner seats to obtain 25,000 nominating signatures from the suburbs unduly burdens their right to run for those seats under the Party name. Although petitioners suggest that their showing of support in the city district should qualify their candidates to represent the Party in all races within Cook County, in the absence of any claim that the division of Cook County into separate districts is itself unconstitutional, our precedents foreclose the argument. According to the Board's uncontested arithmetic, the 25,000 signature rule requires the support of only slightly more than 2% of suburban voters, see Brief for Respondent Board in No. 90-1126, p. 9, and n. 7, a considerably more lenient restriction than the one we upheld in *Jenness v. Fortson,* 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971) (involving a 5% requirement). Just as the State may not cite the Party's failure in the suburbs as reason for disqualifying its candidates in urban Cook County, neither may the Party cite its success in the city district as a sufficient condition for running candidates in the suburbs.

IV

These cases present one final issue, which we are unable to resolve. Some of Cook County's judges are elected by citizens of the ****709** entire county, and others by citizens of the separate districts. In responding to Reed's objection that the HWP had not fielded candidates for any elected judicial offices in Cook County, the Circuit Court held that, under § 10-2, "the exclusion of judicial candidates on the slate was a failure to fulfill the 'complete slate requirement' of the Election Code." The court then overruled the Electoral Board and treated this failure as an alternative ground for invalidating the

Party's entire slate.

***296** We decline to consider whether that ruling was constitutional. The Supreme Court of Illinois itself did not address it and therefore did not decide whether, under Illinois law, the Party's omission of judicial candidates doomed the entire slate. [FN11] We therefore remand these cases to that court for its prompt resolution of this issue. See *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 277, 104 S.Ct. 3049, 3058, 82 L.Ed.2d 200 (1984); see also *McCluney v. Jos. Schlitz Brewing Co.*, 454 U.S. 1071, 1073-1074, 102 S.Ct. 624, 625-626, 70 L.Ed.2d 607 (1981) (STEVENS, J., dissenting). [FN12]

FN11. Among other possibilities, the Supreme Court of Illinois might agree with the Board's conclusion that the judgeships at issue are not offices of the same "political subdivision" as nonjudicial offices within Cook County. That court might also construe the decision in *Anderson v. Schneider*, 67 Ill.2d 165, 8 Ill.Dec. 514, 365 N.E.2d 900 (1977), to hold that an omission of judicial candidates should not invalidate the rest of the slate.

FN12. To restate our conclusion, any rule, whether or not denominated the "complete slate" requirement, see, *e.g., post,* at 710-711 (dissenting opinion's use of the term in this context); App. to Pet. for Cert. in No. 90-1435, pp. 23a-24a (Circuit Court's use of the term in this context), that disqualifies petitioners' entire slate for failure to collect 25,000 signatures wholly from the suburban district would be unconstitutional for the reasons given in Part III B above. We express no opinion as to the constitutionality of a "complete slate requirement" that would invalidate petitioners' slate for their failure to field judicial candidates.

The judgment of the State Supreme Court is affirmed in part and reversed in part, and the cases are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice THOMAS took no part in the consideration or decision of these cases.

Justice SCALIA, dissenting.

In the absence of an opinion by the Illinois Supreme Court defending its own judgment, and lacking any clear alternative analysis presented by respondents, the Court accepts petitioners' characterization of these cases as involving ***297** straightforward application of our decision invalidating a previous version of the Illinois election law, *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 99 S.Ct. 983, 59 L.Ed.2d 230 (1979). That characterization is in my view wrong, and leads to the wrong result. No proper basis has been established in these cases for interfering with the State of Illinois' arrangement of its elections.

Socialist Workers Party involved a challenge to Illinois' then-requirement that, in elections for offices in political subdivisions of the State, new political parties (and independent candidates) had to obtain the signatures of 5% of the number of persons who voted at the previous election for those offices, no matter how high that number might be--even though new parties could qualify for *statewide* elections by gathering only 25,000 signatures. See *id.*, at 175-176, 99 S.Ct., at 985-986. The Socialist Workers Party objected to having to collect over 60,000 signatures to run a candidate in the Chicago mayoral election. See *id.*, at 177, 99 S.Ct., at 986. We held that, although the State had a legitimate interest in ensuring that a party or independent candidate had a " 'significant modicum of support,' " there was "no reason" justifying a requirement of greater support for Chicago elections than for statewide elections. *Id.*, at 185-186, 99 S.Ct., at 990-991.

****710** The Court contends that the current Illinois law, as interpreted by the Illinois Supreme Court, suffers from the same "constitutional flaw": It "effectively increas[es] the signature requirement applicable to elections for at least some offices in subdivisions with separate districts [because] the failure of a party's organizers to obtain 25,000 signatures for each district in which they run

candidates disqualifies the party's candidates in all races within the subdivision." *Ante,* at 707. Thus, "a prerequisite to establishing a new political party in such multidistrict subdivisions is some multiple of the number of signatures required of new statewide parties." *Ibid.*

This analysis serves only to demonstrate why *Socialist Workers Party* is distinguishable. There is no heightened ***298** signature requirement (as there was in *Socialist Workers Party*) for any single office; each candidate (and the party) for each district election and each countywide election need obtain no more than 25,000 signatures. What creates "effectively," as the Court says, a sort of heightened signature minimum is the requirement that a new party run a "complete slate," *i.e.,* a candidate in each of the subdivision's districts. By virtue of that requirement, no one can run *as a new-party candidate* in any district unless there are not only 25,000 signatures for him in his own district, but also 25,000 votes for the party's candidate in each of the other districts. Such indirect consequences of a "complete slate" requirement were, of course, not at issue in *Socialist Workers Party,* which involved a single election for an at-large position. Thus, *Socialist Workers Party* is not at all dispositive of these cases.

It seems clear that the "complete slate" rule advances a legitimate state interest. It is reasonable to require a purported "party," which presumably has policy plans for the political subdivision, to run candidates in all the districts that elect the multimember board governing the subdivision. Otherwise, it is less a "party" than an election committee for one member of the board. The Court ultimately concedes this, and concedes that this state interest was *not* involved (and therefore *not* taken into account) in *Socialist Workers Party. Ante,* at 707-708. It nonetheless argues that this makes no difference, because: (1) Illinois could have achieved its interest in multidistrict support for the party by requiring that some proportion of the total signatures be from each district, but requiring no more than a 25,000 total, *ibid.*; and (2) multidistrict support is not an interest that Illinois considers important, since it "does not require a new party fielding candidates solely for statewide office to apportion its nominating signatures among the various counties or other political subdivisions of the State," *ante,* at 294.

***299** I find neither response persuasive. As to the first: We did not say in *Socialist Workers Party* that the constitutionally permissible number for qualification in the various political subdivisions of the State had to be some fraction (presumably based on population) of the statewide 25,000 figure; to the contrary, we permitted the State to require in political subdivisions any number *up to* 25,000. Illinois has simply taken us at our word. Nor does this amount to an irrational failure to "apportion." Illinois' genuine *minimum,* we must recall, is a percentage (5%) of the votes in the prior election, which of course automatically adjusts for the size of the electoral unit. The 25,000 figure is simply a *cap* upon that minimum, and it is not at all reasonable to think an "apportionment" of that cap will assure serious voter support. As to the second argument: The fact that Illinois does not require geographic distribution of support for statewide office is irrelevant. Neither does it require geographic distribution, as such, in these Cook County elections. It does not care if all of the support for the Harold Washington Party, in each districtwide election, comes from a single ward--just as it does not care, in statewide elections, if all of a new party's support ****711** comes from a single county. What the law under challenge here reflects is not concern for *geographically distributed support,* but concern for *serious support in each election;* and when some of the elections are not at large but by district, the support must exist within each district.

Perhaps there are reasons why Illinois' "complete slate" requirement for political subdivisions is constitutionally invalid. The point might be made, for example, that the absence of any such requirement in statewide elections demonstrates (to take the Court's language erroneously addressed to a different point) that Illinois "deems [the requirement] unimportant," and has no "serious state interest" in it. *Ante,* at 708. But as American political scientists have known since James Madison pointed it out, see The Federalist No. 10, pp. 62-64 (H. Dawson ed. 1876), the dangers of ***300** factionalism decrease as the political unit becomes larger. There is not much chance the State as a whole will be hamstrung by a multitude of so-called "parties," each of which represents the sectional interest of only one or a few districts;

there is a real possibility that the Cook County Board will be stalemated by an equal division between "City Party" and "County Party" members. But the litigants here have not addressed whether the "complete slate" requirement is unconstitutional, and I decline to speculate. It must be assumed to be legitimate, in which case there is no basis for saying that 25,000 signatures for each district election (if that is less than 5% of the votes in the prior district election) cannot be demanded. The Court's holding that these cases are simply governed by *Socialist Workers Party* seems to me quite wrong. I respectfully dissent.

502 U.S. 279, 112 S.Ct. 698, 116 L.Ed.2d 711, 60 USLW 4075

Briefs and Other Related Documents (Back to top)

• 1991 WL 636248 (Oral Argument) Oral Argument (Oct. 07, 1991)

• 1991 WL 11009299 (Appellate Petition, Motion and Filing) Petitioners' Supplemental Brief (Sep. 20, 1991)Original Image of this Document (PDF)

• 1991 WL 11177918 (Appellate Petition, Motion and Filing) Reply Brief of Petitioners Cook County Officers Electoral Board, Et Al. (May. 13, 1991)

• 1991 WL 11009200 (Appellate Petition, Motion and Filing) Motion for Leave to File Brief of Amicus Curiae and Brief of Independent Voters of Illinois-Independent Precinct Organization as Amicus Curiae in Support of Petitioners (Mar. 07, 1991)Original Image of this Document (PDF)

• 1990 WL 10022923 (Appellate Petition, Motion and Filing) Petition for Writ of Certiorari to the Illinois Supreme Court (Oct. 19, 1990)Original Image of this Document (PDF)

• 1990 WL 10058355 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari to the Supreme Court of Illinois (Oct. Term 1990)

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84 S.Ct. 1362
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(Cite as: 377 U.S. 533, 84 S.Ct. 1362)

Supreme Court of the United States

B. A. REYNOLDS, etc., et al., Appellants,
v.
M. O. SIMS et al.
David J. VANN and Robert S. Vance, Appellants,
v.
Agnes BAGGETT, Secretary of State of Alabama et al.
John W. McCONNELL, Jr., et al., Appellants,
v.
Agnes BAGGETT, Secretary of State of Alabama et al.

Nos. 23, 27, 41.

Argued Nov. 13, 1963.
Decided June 15, 1964.
Rehearing Denied Oct. 12, 1964.

See 85 S.Ct. 12, 13.

Alabama legislative apportionment cases. The three-judge United States District Court for the Middle District of Alabama, 208 F.Supp. 431, gave its decision, and appeals were taken. The Supreme Court, Mr. Chief Justice Warren, held that the existing and two legislatively proposed plans for apportionment of seats in the two houses of the Alabama Legislature are invalid under the Equal Protection Clause in that the apportionment is not on a population basis and is completely lacking in rationality.

Affirmed and remanded.

Mr. Justice Harlan dissented.

West Headnotes

[1] Constitutional Law ⚿68(3)
92k68(3) Most Cited Cases
Plaintiffs in Alabama legislative reapportionment case had no effective political remedy to obtain relief.

[2] Constitutional Law ⚿225.2(1)
92k225.2(1) Most Cited Cases
[2] Elections ⚿11
144k11 Most Cited Cases
The Constitution of United States protects right of all qualified citizens to vote, in state as well as in federal elections. U.S.C.A.Const. Amends. 14, 15, 17, 19, 23, 24.

[3] Elections ⚿15
144k15 Most Cited Cases
The right to vote can neither be denied outright, nor can it be destroyed by alteration of ballots, nor diluted by ballot-box stuffing.

[4] Elections ⚿1
144k1 Most Cited Cases
Qualified voters in a state have a right to cast their ballots and to have them counted.

[5] Elections ⚿15
144k15 Most Cited Cases
The right to vote freely for candidate of one's choice is of the essence of democratic society, and any restrictions on that right strike at heart of representative government.

[6] Elections ⚿15
144k15 Most Cited Cases
The right of suffrage can be denied by debasement or dilution of weight of citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

[7] States ⚿27(4.1)
360k27(4.1) Most Cited Cases
(Formerly 360k27(4), 360k27)
The fundamental principle of representative government in this country is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state.

[8] Constitutional Law ⚿225.3(4)
92k225.3(4) Most Cited Cases
(Formerly 92k225(1))
A predominant consideration in determining whether state's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under Equal Protection Clause is that rights allegedly impaired are individual and personal in nature. U.S.C.A.Const. Amend. 14.

[9] Constitutional Law ⚿225.3(4)
92k225.3(4) Most Cited Cases
(Formerly 92k225(1))
In a state legislative apportionment case, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the state's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. U.S.C.A.Const. Amend. 14.
[10] Elections ⚿1
144k1 Most Cited Cases
[10] Elections ⚿15
144k15 Most Cited Cases
The right of suffrage is a fundamental matter in a free and democratic society; since right to exercise franchise in free and unimpaired manner is preservative of other basic civil and political rights any alleged infringement of right of citizens to vote must be carefully and meticulously scrutinized. U.S.C.A.Const. Amend. 14.
[11] Elections ⚿5
144k5 Most Cited Cases
State election systems should be designed to give approximately equal weight to each vote cast.
[12] Constitutional Law ⚿211(1)
92k211(1) Most Cited Cases
(Formerly 92k211)
The constitution forbids sophisticated as well as simple-minded modes of discrimination. U.S.C.A.Const. Amend. 14.
[13] Constitutional Law ⚿225.3(6)
92k225.3(6) Most Cited Cases
(Formerly 92k225(1))
Vote-diluting discrimination cannot be accomplished through device of districts containing widely varied numbers of inhabitants. U.S.C.A.Const. Amend. 14.
[14] Constitutional Law ⚿225.3(6)
92k225.3(6) Most Cited Cases
(Formerly 92k225(1))
A voting regulation which discriminates against residents of populous counties in state in favor of rural sections lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment. U.S.C.A.Const. Amend. 14
.
[15] States ⚿27(4.1)
360k27(4.1) Most Cited Cases
(Formerly 360k27(4), 360k27)
Each citizen has an inalienable right to full and effective participation in political processes of his state's legislative bodies; full and effective participation requires that each citizen has an equally effective voice in election of members of his state legislature.
[16] States ⚿24.1
360k24.1 Most Cited Cases
(Formerly 360k24)
Legislatures should be bodies which are collectively responsive to the popular will.
[17] Constitutional Law ⚿209
92k209 Most Cited Cases
The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. U.S.C.A.Const. Amend. 14.
[18] States ⚿27(4.1)
360k27(4.1) Most Cited Cases
(Formerly 360k27(4), 360k27)
The achieving of fair and effective representation for all citizens is the basic aim of legislative apportionment.
[19] Constitutional Law ⚿225.3(1)
92k225.3(1) Most Cited Cases
(Formerly 92k225(1))
The Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators; diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment. U.S.C.A.Const. Amend. 14.
[20] Constitutional Law ⚿67
92k67 Most Cited Cases
A denial of constitutionally protected rights demands judicial protection.
[21] Federal Courts ⚿6
170Bk6 Most Cited Cases
(Formerly 106k262.4(1))
When a state exercises power wholly within domain of state interest, it is insulated from federal judicial review; but such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.
[22] Elections ⚿15
144k15 Most Cited Cases
The fact that an individual lives here or there is not a legitimate reason for over-weighting or diluting the efficacy of his vote.
[23] Constitutional Law ⚿225.3(2.1)
92k225.3(2.1) Most Cited Cases

(Formerly 92k225.3(2), 92k225(1))
State legislative malapportionment is constitutionally impermissible under the Equal Protection Clause. U.S.C.A.Const. Amend. 14.

[24] States ⚿27(5)
360k27(5) Most Cited Cases
(Formerly 360k27)
Population is the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies.

[25] Constitutional Law ⚿225.3(4)
92k225.3(4) Most Cited Cases
(Formerly 92k225(1))
The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races. U.S.C.A.Const. Amend. 14.

[26] Constitutional Law ⚿225.3(9)
92k225.3(9) Most Cited Cases
(Formerly 92k225(1))
The Equal Protection Clause requires that seats in both houses of bicameral state legislature must be apportioned on population basis. U.S.C.A.Const. Amend. 14.

[27] Constitutional Law ⚿225.3(1)
92k225.3(1) Most Cited Cases
(Formerly 92k225(1))
An individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the state. U.S.C.A.Const. Amend. 14.

[28] Constitutional Law ⚿225.3(6)
92k225.3(6) Most Cited Cases
(Formerly 92k225(1))

[28] States ⚿27(5)
360k27(5) Most Cited Cases
(Formerly 360k27)
The existing and two legislatively proposed plans for apportionment of seats in the two houses of the Alabama Legislature are invalid under Equal Protection Clause in that the apportionment is not on a population basis and is completely lacking in rationality. U.S.C.A.Const. Amend. 14; Const. Ala.1901, §§ 50, 197-200, 284; Code of Ala., Tit. 32, §§ 1, 2; Laws Ala.1962, Sp.Sess. p. 121.

[29] Constitutional Law ⚿225.3(6)
92k225.3(6) Most Cited Cases
Mathematical nicety is not a constitutional prerequisite to state legislative apportionment. U.S.C.A.Const. Amend. 14.

[30] States ⚿27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
In Alabama legislative reapportionment cases, the district court properly considered two legislatively proposed apportionment plans, although neither was to become effective until 1966 election and proposed constitutional amendment was scheduled to be submitted to state's voters in November 1962; this consideration was necessary to determine whether Alabama Legislature had acted effectively to correct the already existing malapportionment and in ascertaining what sort of judicial relief, if any, should be afforded. U.S.C.A.Const. Amend. 14 ; Const.Ala.1901, §§ 50, 197-200, 284; Code of Ala., Tit. 32, §§ 1, 2; Laws Ala.1962. Sp.Sess. p. 121.

[31] States ⚿27(8)
360k27(8) Most Cited Cases
(Formerly 360k27)
The so-called federal analogy of an upper house on a geographical basis and a lower house on a population basis is inapplicable to state legislative apportionment matters, notwithstanding that almost three-fourths of the present states were never in fact independently sovereign. U.S.C.A.Const. Amend. 14.

[32] States ⚿27(8)
360k27(8) Most Cited Cases
(Formerly 360k27)
When the system of representation in the Federal Congress was adopted, there was no intention of establishing a pattern or model for the apportionment of seats in state legislatures.

[33] United States ⚿7.1
393k7.1 Most Cited Cases
(Formerly 393k7)

[33] United States ⚿10
393k10 Most Cited Cases
The system of representation in the two Houses of the Federal Congress was conceived out of compromise and concession indispensable to the establishment of the federal republic and was based on the consideration that in establishing federalism a group of formerly independent states bound themselves together under one national government.

[34] Municipal Corporations ⚿54
268k54 Most Cited Cases
Political subdivisions of states are not sovereign entities; they are subordinate governmental instrumentalities created by state to assist in

carrying out state governmental functions.

[35] Counties ⇦1
104k1 Most Cited Cases

[35] Counties ⇦24
104k24 Most Cited Cases

[35] Municipal Corporations ⇦54
268k54 Most Cited Cases

[35] Municipal Corporations ⇦64
268k64 Most Cited Cases

Political subdivisions of states such as counties and cities, are created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them, and the number, nature, and duration of the powers conferred upon them and the territory over which they shall be exercised rests in the absolute discretion of the state.

[36] States ⇦27(8)
360k27(8) Most Cited Cases
(Formerly 360k27)

Legislatively proposed plan for apportionment of seats in Alabama Legislature cannot be sustained by recourse to the so-called federal analogy. Laws Ala.1962, Sp.Sess., p. 121; U.S.C.A.Const. Amend. 14.

[37] States ⇦27(8)
360k27(8) Most Cited Cases
(Formerly 360k27)

The concept of bicameralism is not rendered anachronistic and meaningless when predominant basis of representation in the two state legislative bodies is required to be population; a prime reason for bicameralism is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures; simply because controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies.

[38] Constitutional Law ⇦225.3(6)
92k225.3(6) Most Cited Cases
(Formerly 92k225(1))

The Equal Protection Clause requires that a state make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable; however, it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters; mathematical exactness or precision is not a workable constitutional requirement. U.S.C.A.Const. Amend. 14.

[39] Constitutional Law ⇦225.3(8)
92k225.3(8) Most Cited Cases
(Formerly 92k225(1))

It is constitutionally valid to use political subdivision lines in establishing state legislative districts, so long as the resulting apportionment is based substantially on population and the equal-population principle is not diluted in any significant way. U.S.C.A.Const. Amend. 14.

[40] States ⇦27(4.1)
360k27(4.1) Most Cited Cases
(Formerly 360k27(4), 360k27)

What is marginally permissible in one state in respect to legislative apportionment may be unsatisfactory in another, depending on the particular circumstances of the case.

[41] States ⇦27(4.1)
360k27(4.1) Most Cited Cases
(Formerly 360k27(4), 360k27)

Developing a body of doctrine on a case-by-case basis is the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. U.S.C.A.Const. Amend. 14.

[42] States ⇦27(7)
360k27(7) Most Cited Cases
(Formerly 360k27)

A state may legitimately desire to maintain integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing legislative apportionment scheme; valid considerations may underlie such aims.

[43] States ⇦27(7)
360k27(7) Most Cited Cases
(Formerly 360k27)

Single-member districts may be the rule in one state, while another state might desire to achieve some flexibility by creating multimember or floterial districts; whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen.

[44] States ⇦27(5)
360k27(5) Most Cited Cases
(Formerly 360k27)

So long as divergences from strict population standard are based on legitimate considerations incident to effectuation of rational state policy,

some deviations from equal-population principle are constitutionally permissible with respect to apportionment of seats in either or both of two houses of bicameral state legislature.

[45] States ⚿27(5)
360k27(5) Most Cited Cases
(Formerly 360k27)
Neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation in both houses of state legislature.

[46] States ⚿27(5)
360k27(5) Most Cited Cases
(Formerly 360k27)
Considerations of area alone provide an insufficient justification for deviations from equal-population principle applicable in apportioning seats in both houses of state legislature.

[47] States ⚿27(5)
360k27(5) Most Cited Cases
(Formerly 360k27)
Arguments for allowing deviations from population-based representation in both houses of state legislature in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that availability of access of citizens to their representatives is impaired are, for the most part, unconvincing.

[48] States ⚿27(7)
360k27(7) Most Cited Cases
(Formerly 360k27)
A state can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, so long as the basic standard of equality of population among districts is maintained; however, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be given separate representation, regardless of population.

[49] States ⚿27(7)
360k27(7) Most Cited Cases
(Formerly 360k27)
A state may legitimately desire to construct legislative districts along political subdivision lines to deter the possibilities of gerrymandering.

[50] Constitutional Law ⚿225.3(8)
92k225.3(8) Most Cited Cases
(Formerly 92k225(1))
If scheme of giving at least one seat in one house of state legislature to each political subdivision, such as a county, results in total subversion of equal-population principle in that legislative body, this result would be constitutionally impermissible. U.S.C.A.Const. Amend. 14.

[51] States ⚿25
360k25 Most Cited Cases
Determining size of its legislative bodies is a matter within discretion of each individual state.

[52] States ⚿27(5)
360k27(5) Most Cited Cases
(Formerly 360k27)
Careful judicial scrutiny must be given, in evaluating state legislative apportionment schemes, to character as well as degree of deviations from strict population basis.

[53] Constitutional Law ⚿225.3(8)
92k225.3(8) Most Cited Cases
(Formerly 92k225(1))
If, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as controlling consideration in apportionment of seats in particular legislative body, then right of all of state's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

[54] States ⚿27(5)
360k27(5) Most Cited Cases
(Formerly 360k27)
The admission of states into the Union with constitutions creating bicameral legislatures the membership in which is not apportioned on a population basis is not a justification for deviations from population in the apportionment of seats in the legislature. U.S.C.A.Const. Amend. 14.

[55] Constitutional Law ⚿68(1)
92k68(1) Most Cited Cases
Some questions raised under the Guaranty Clause of the Federal Constitution and nonjusticiable, where "political" in nature and where there is a clear absence of judicially manageable standards. U.S.C.A.Const. art. 4, § 4.

[56] Constitutional Law ⚿225.3(6)
92k225.3(6) Most Cited Cases
(Formerly 92k225(1))

[56] States ⚿4.3
360k4.3 Most Cited Cases
Despite congressional approval of state legislative apportionment plans at time of admission into Union, even though deviating from

equal-population principle, the Equal Protection Clause requires more; an apportionment scheme in which both houses are based on population can hardly be considered as failing to satisfy the Guaranty Clause requirement. U.S.C.A.Const. art. 4, § 4; Amend. 14.

[57] States ⚿9
360k9 Most Cited Cases
Congress presumably does not assume, in admitting states into the Union, to pass on all constitutional questions relating to character of state governmental organization.

[58] States ⚿27(4.1)
360k27(4.1) Most Cited Cases
(Formerly 360k27(4), 360k27)
Congressional approval of admission of state into Union does not validate an unconstitutional state legislative apportionment. U.S.C.A.Const. Amend. 14.

[59] Federal Courts ⚿171
170Bk171 Most Cited Cases
(Formerly 106k262.4(1))
Congress lacks constitutional power to insulate states from attack with respect to alleged deprivations of individual constitutional rights.

[60] Constitutional Law ⚿225.3(3)
92k225.3(3) Most Cited Cases
That the Equal Protection Clause requires that both houses of state legislature be apportioned on population basis does not mean that states cannot adopt some reasonable plan for periodic revision of their apportionment schemes; decennial reapportionment is a rational approach to readjustment of legislative representation in order to take into account population shifts and growth; the Equal Protection Clause does not require daily, monthly, annual or biennial reapportionment, so long as state has a reasonably conceived plan for periodic readjustment of legislative representation; the minimal requirement is decennial reapportionment. U.S.C.A.Const. Amend. 14.

[61] Constitutional Law ⚿225.3(3)
92k225.3(3) Most Cited Cases
With respect to operation of Equal Protection Clause, it makes no difference whether a state's legislative apportionment scheme is embodied in its constitution or in statutory provisions. U.S.C.A.Const. Amend. 14.

[62] Constitutional Law ⚿48(7)
92k48(7) Most Cited Cases
State constitutional provisions should be deemed violative of Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated.

[63] Injunction ⚿189
212k189 Most Cited Cases
Courts should attempt to accommodate the relief ordered in state legislative apportionment cases to the apportionment provisions of state constitutions insofar as it is possible.

[64] Constitutional Law ⚿225.3(3)
92k225.3(3) Most Cited Cases
(Formerly 92k225(1))
A state legislative apportionment scheme is no less violative of Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. U.S.C.A.Const. Amend. 14.

[65] States ⚿18.5
360k18.5 Most Cited Cases
(Formerly 360k4.8)
When there is an unavoidable conflict between the Federal and State Constitutions, the Supremacy Clause of Federal Constitution controls. U.S.C.A.Const. art. 6.

[66] States ⚿27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
Remedial techniques in state legislative apportionment cases will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions.

[67] States ⚿27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
Once a state's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan; however, under certain circumstances, such as where an impending election is imminent and a state's election machinery is already in progress, equitable considerations might justify a court in withholding granting of immediately effective relief in legislative apportionment case.

[68] States ⚿27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
In awarding or withholding immediate relief in state legislative apportionment case, court is entitled

to and should consider proximity of forthcoming election and mechanics and complexities of state election laws, and should act and rely upon general equitable principles.

[69] States ⚿27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
With respect to timing of relief in state legislative apportionment case, a court can reasonably endeavor to avoid a disruption of election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a state in adjusting to requirements of court's decree.

[70] States ⚿27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
Any relief accorded in state legislative apportionment case can be fashioned in light of well-known principles of equity.

[71] Federal Courts ⚿52
170Bk52 Most Cited Cases
(Formerly 106k260.4)
The district court wisely declined to stay impending primary election in Alabama, and properly refrained from acting further until Alabama Legislature had been given opportunity to remedy admitted discrepancies in state's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action.

[72] Constitutional Law ⚿68(3)
92k68(3) Most Cited Cases
The district court correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. U.S.C.A.Const. Amend. 14.

[73] States ⚿27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
The district court acted with proper judicial restraint, after Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in the state's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect, at a time sufficiently early to permit holding of elections pursuant to that plan without great difficulty, and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibilities for reapportionment which rests with the legislature. U.S.C.A.Const. Amend. 14.

[74] Federal Courts ⚿61
170Bk61 Most Cited Cases
(Formerly 106k260.4)

[74] States ⚿27(10)
360k27(10) Most Cited Cases
(Formerly 106k262.4(11))
The action taken by district court in Alabama legislative apportionment case, in ordering into effect a reapportionment of both houses of Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, was an appropriate and well-considered exercise of judicial power, and the district court correctly indicated that the plan was invalid as a permanent apportionment; in retaining jurisdiction while deferring a hearing on issuance of final injunction in order to give the provisionally reapportioned legislature an opportunity to act effectively, the district court proceeded in a proper fashion.

[75] Federal Courts ⚿480
170Bk480 Most Cited Cases
(Formerly 30k1144)
Since the district court evinced its realization that its ordered reapportionment could not be sustained as basis for conducting 1966 election of Alabama legislators, and avowedly intends to take some further action should reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim, the Supreme Court affirmed the judgment and remanded the cases for further proceedings.

****1368 *536** W. McLean Pitts, Selma, Ala., for appellants in No. 23 and appellees in Nos. 27 and 41.

Richmond M. Flowers, Atty. Gen. of Alabama, for appellee Richmond M. Flowers.

Charles Morgan, Jr., Birmingham, Ala., for appellees in No. 23.

David J. Vann, Birmingham, Ala., for appellants in No. 27.

John W. McConnell, Jr., Mobile, Ala., for appellants in No. 41.

Archibald Cox, Sol. Gen. for the United States, as amicus curiae, by special leave of Court.

Mr. Chief Justice WARREN delivered the opinion of the Court.

Involved in these cases are an appeal and two cross-appeals from a decision of the Federal District Court for the Middle District of Alabama holding invalid, under ***537** the Equal Protection Clause of the Federal Constitution, the existing and two legislative proposed plans for the apportionment of seats in the two houses of the Alabama Legislature, and ordering into effect a temporary reapportionment plan comprised of parts of the proposed but judicially disapproved measures. [FN1]

> FN1. Sims v. Frink, 208 F.Supp. 431 (D.C.M.D.Ala.1962). All decisions of the District Court in this litigation are reported sub nom. Sims v. Frink.

I.

On August 26, 1961, the original plaintiffs (appellees in No. 23), residents, taxpayers and voters of Jefferson County, Alabama, filed a complaint in the United ****1369** States District Court for the Middle District of Alabama, in their own behalf and on behalf of all similarly situated Alabama voters, challenging the apportionment of the Alabama Legislature. Defendants below (appellants in No. 23), sued in their representative capacities, were various state and political party officials charged with the performance of certain duties in connection with state elections. [FN2] The complaint alleged a deprivation of rights under the Alabama Constitution and under the Equal Protection Clause of the Fourteenth Amendment, and asserted that the District Court had jurisdiction under provisions of the Civil Rights Act, 42 U.S.C. ss 1983, 1988, as well as under 28 U.S.C. s 1343(3).

> FN2. Included among the defendants were the Secretary of State and the Attorney General of Alabama, the Chairmen and Secretaries of the Alabama State Democratic Executive Committee and the State Republican Executive Committee, and three Judges of Probate of three counties, as representatives of all the probate judges of Alabama.

The complaint stated that the Alabama Legislature was composed of a Senate of 35 members and a House of Representatives of 106 members. It set out relevant portions of the 1901 Alabama Constitution, which prescribe the number of members of the two bodies of the ***538** State Legislature and the method of apportioning the seats among the State's 67 counties, and provide as follows:

> Art. IV, Sec. 50. 'The legislature shall consist of not more than thirty-five senators, and not more than one hundred and five members of the house of representatives, to be apportioned among the several districts and counties, as prescribed in this Constitution; provided that in addition to the above number of representatives, each new county hereafter created shall be entitled to one representative.'
>
> Art. IX, Sec. 197. 'The whole number of senators shall be not less than one-fourth or more than one-third of the whole number of representatives.'
>
> Art. IX, Sec. 198. 'The house of representatives shall consist of not more than one hundred and five members, unless new counties shall be created, in which event each new county shall be entitled to one representative. The members of the house of representatives shall be apportioned by the legislature among the several counties of the state, according to the number of inhabitants in them, respectively, as ascertained by the decennial census of the United States, which apportionment, when made, shall not be subject to alteration until the next session of the legislature after the next decennial census of the United States shall have been taken.'
>
> Art. IX, Sec. 199. 'It shall be the duty of the legislature at its first session after the taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of representatives and apportion them among the several counties of the state, according to the number of inhabitants in them, respectively; provided, that ***539** each county shall be entitled to at least one representative.'

Art. IX, Sec. 200. 'It shall be the duty of the legislature at its first session after taking of the decennial census of the United States in the year nineteen hundred and ten, and after each subsequent decennial census, to fix by law the number of senators, and to divide the state into as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, ****1370** and each shall be entitled to one senator, and no more; and such districts, when formed, shall not be changed until the next apportioning session of the legislature, after the next decennial census of the United States shall have been taken; provided, that counties created after the next preceding apportioning session of the legislature may be attached to senatorial districts. No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other.'

Art. XVIII, Sec. 284. '* * * Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments.'

The maximum size of the Alabama House was increased from 105 to 106 with the creation of a new county in 1903, pursuant to the constitutional provision which states that, in addition to the prescribed 105 House seats, each county thereafter created shall be entitled to one representative. Article IX, ss 202 and 203, of the Alabama Constitution established precisely the boundaries of the State's senatorial and representative districts until the enactment of a new reapportionment plan by the legislature. These 1901 constitutional provisions, specifically describing the composition of the senatorial ***540** districts and detailing the number of House seats allocated to each county, were periodically enacted as statutory measures by the Alabama Legislature, as modified only by the creation of an additional county in 1903, and provided the plan of legislative apportionment existing at the time this litigation was commenced. [FN3]

FN3. Provisions virtually identical to those contained in Art. IX, ss 202 and 203, were enacted into the Alabama Codes of 1907 and 1923, and were most recently reenacted as statutory provisions in ss 1 and 2 of Tit. 32 of the 1940 Alabama Code (as recompiled in 1958).

Plaintiffs below alleged that the last apportionment of the Alabama Legislature was based on the 1900 federal census, despite the requirement of the State Constitution that the legislature be reapportioned decennially. They asserted that, since the population growth in the State from 1900 to 1960 had been uneven, Jefferson and other counties were now victims of serious discrimination with respect to the allocation of legislative representation. As a result of the failure of the legislature to reapportion itself, plaintiffs asserted, they were denied 'equal suffrage in free and equal elections * * * and the equal protection of the laws' in violation of the Alabama Constitution and the Fourteenth Amendment to the Federal Constitution. The complaint asserted that plaintiffs had no other adequate remedy, and that they had exhausted all forms of relief other than that available through the federal courts. They alleged that the Alabama Legislature had established a pattern of prolonged inaction from 1911 to the present which 'clearly demonstrates that no reapportionment * * * shall be effected'; that representation at any future constitutional convention would be established by the legislature, making it unlikely that the membership of any such convention would be fairly representative; and that, while the Alabama Supreme Court had found that the legislature had not complied with the State Constitution in failing to reapportion according ***541** to population decennially, [FN4] that court had nevertheless indicated that it would ****1371** not interfere with matters of legislative reapportionment. [FN5]

FN4. See Opinion of the Justices, 263 Ala. 158, 164, 81 So.2d 881, 887 (1955), and Opinion of the Justices, 254 Ala. 185, 187, 47 So.2d 714, 717 (1950), referred to by the District Court in its preliminary opinion. Sims v. Frink, 205 F.Supp. 245, at 247.

FN5. See Ex parte Rice, 273 Ala. 712, 143 So.2d 848 (1962), where the Alabama Supreme Court, on May 9, 1962, subsequent to the District Court's preliminary order in the instant litigation as well as our decision in Baker v. Carr, 369

> U.S. 186, 82 S.Ct. 691, refused to review a denial of injunctive relief sought against the conducting of the 1962 primary election until after reapportionment of the Alabama Legislature, stating that 'this matter is a legislative function, and * * * the Court has no jurisdiction * * *.' And in Waid v. Pool, 255 Ala. 441, 51 So.2d 869 (1951), the Alabama Supreme Court, in a similar suit, had stated that the lower court had properly refused to grant injunctive relief because 'appellants * * * are seeking interference by the judicial department of the state in respect to matters committed by the constitution to the legislative department.' 255 Ala., at 442, 51 So.2d, at 870.

Plaintiffs requested that a three-judge District Court be convened. [FN6] With respect to relief, they sought a declaration that the existing constitutional and statutory provisions, establishing the present apportionment of seats in the Alabama Legislature, were unconstitutional under the Alabama and Federal Constitutions, and an injunction against the holding of future elections for legislators until the legislature reapportioned itself in accordance with the State Constitution. They further requested the issuance of a mandatory injunction, effective until such time as the legislature properly reapportioned, requiring the conducting of the 1962 election for legislators at large over the entire State, and any other relief which 'may seem just, equitable and proper.'

FN6. Under 28 U.S.C. ss 2281 and 2284.

A three-judge District Court was convened, and three groups of voters, taxpayers and residents of Jefferson, Mobile, and Etowah Counties were permitted to intervene ***542** in the action as intervenor-plaintiffs. Two of the groups are cross-appellants in Nos. 27 and 41. With minor exceptions, all of the intervenors adopted the allegations of and sought the same relief as the original plaintiffs.

On March 29, 1962, just three days after this Court had decided Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 plaintiffs moved for a preliminary injunction requiring defendants to conduct at large the May 1962 Democratic primary election and the November 1962 general election for members of the Alabama Legislature. The District Court set the motion for hearing in an order stating its tentative views that an injunction was not required before the May 1962 primary election to protect plaintiffs' constitutional rights, and that the Court should take no action which was not 'absolutely essential' for the protection of the asserted constitutional rights before the Alabama Legislature had had a 'further reasonable but prompt opportunity to comply with its duty' under the Alabama Constitution.

On April 14, 1962, the District Court, after reiterating the views expressed in its earlier order, reset the case for hearing on July 16, noting that the importance of the case, together with the necessity for effective action within a limited period of time, required an early announcement of its views. 205 F.Supp. 245. Relying on our decision in Baker v. Carr, the Court found jurisdiction, justiciability and standing. It stated that it was taking judicial notice of the facts that there had been population changes in Alabama's counties since 1901, that the present representation in the State Legislature was not on a population basis, and that the legislature had never reapportioned its membership as required by the Alabama Constitution. [FN7] Continuing, the ****1372** Court stated ***543** that if the legislature complied with the Alabama constitutional provision requiring legislative representation to be based on population there could be no objection on federal constitutional grounds to such an apportionment. The Court further indicated that, if the legislature failed to act, or if its actions did not meet constitutional standards, it would be under a 'clear duty' to take some action on the matter prior to the November 1962 general election. The District Court stated that its 'present thinking' was to follow an approach suggested by MR. JUSTICE CLARK in his concurring opinion in Baker v. Carr [FN8] --awarding seats released by the consolidation or revamping of existing districts to counties suffering 'the most egregious discrimination,' thereby releasing the strangle hold on the legislature sufficiently so as to permit the newly elected body to enact a constitutionally valid and permanent reapportionment plan, and allowing eventual dismissal of the case. Subsequently, plaintiffs were permitted to amend their complaint by adding a

further prayer for relief, which asked the District Court to reapportion the Alabama Legislature provisionally so that the rural strangle hold would be relaxed enough to permit it to reapportion itself.

FN7. During the over 60 years since the last substantial reapportionment in Alabama, the State's population increased from 1,828,697 to 3,244,286. Virtually all of the population gain occurred in urban counties, and many of the rural counties incurred sizable losses in population.

FN8. See 369 U.S., at 260, 82 S.Ct., at 733 (Clark, J., concurring).

On July 12, 1962, an extraordinary session of the Alabama Legislature adopted two reapportionment plans to take effect for the 1966 elections. One was a proposed constitutional amendment, referred to as the '67-Senator Amendment.' [FN9] It provided for a House of Representatives consisting of 106 members, apportioned by giving ***544** one seat to each of Alabama's 67 counties and distributing the others according to population by the 'equal proportions' method. [FN10] Using this formula, the constitutional amendment specified the number of representatives allotted to each county until a new apportionment could be made on the basis of the 1970 census. The Senate was to be composed of 67 members, one from each county. The legislation provided that the proposed amendment should be submitted to the voters for ratification at the November 1962 general election.

FN9. Proposed Constitutional Amendment No. 1 of 1962, Alabama Senate Bill No. 29, Act No. 93, Acts of Alabama, Special Session, 1962, p. 124. The text of the proposed amendment is set out as Appendix B to the lower court's opinion. 208 F.Supp., at 443--444.

FN10. For a discussion of this method of apportionment, used in distributing seats in the Federal House of Representatives among the States, and other commonly used apportionment methods, see Schmeckebier, The Method of Equal Proportions, 17 Law & Contemp.Prob. 302 (1952).

The other reapportionment plan was embodied in a statutory measure adopted by the legislature and signed into law by the Alabama Governor, and was referred to as the 'Crawford-Webb Act.' [FN11] It was enacted as standby legislation to take effect in 1966 if the proposed constitutional amendment should fail of passage by a majority of the State's voters, or should the federal courts refuse to accept the proposed amendment (though not rejected by the voters) as effective action in compliance with the requirements of the Fourteenth Amendment. The act provided for a Senate consisting of 35 members, representing 35 senatorial districts established along county lines, and altered only a few of the former districts. In apportioning the 106 seats in the Alabama House of Representatives, the statutory measure gave each county one seat, and apportioned the remaining 39 on a rough population basis, under a formula requiring increasingly more population for a county to be accorded ***545** additional ****1373** seats. The Crawford-Webb Act also provided that it would be effective 'until the legislature is reapportioned according to law,' but provided no standards for such a reapportionment. Future apportionments would presumably be based on the existing provisions of the Alabama Constitution which the statute, unlike the proposed constitutional amendment, would not affect.

FN11. Alabama Reapportionment Act of 1962, Alabama House Bill No. 59, Act No. 91, Acts of Alabama, Special Session, 1962, p. 121. The text of the act is reproduced as Appendix C to the lower court's opinion. 208 F.Supp., at 445--446.

The evidence adduced at trial before the three-judge panel consisted primarily of figures showing the population of each Alabama county and senatorial district according to the 1960 census, and the number of representatives allocated to each county under each of the three plans at issue in the litigation--the existing apportionment (under the 1901 constitutional provisions and the current statutory measures substantially reenacting the same plan), the proposed 67-Senator constitutional amendment, and the Crawford-Webb Act. Under all three plans, each senatorial district would be represented by only one senator.

On July 21, 1962, the District Court held that the

inequality of the existing representation in the Alabama Legislature violated the Equal Protection Clause of the Fourteenth Amendment, a finding which the Court noted had been 'generally conceded' by the parties to the litigation, since population growth and shifts had converted the 1901 scheme, as perpetuated some 60 years later, into an invidiously discriminatory plan completely lacking in rationality. 208 F.Supp. 431. Under the existing provisions, applying 1960 census figures, only 25.1% of the State's totel population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives. Population-variance ratios of up to about 41-to-1 existed in the Senate, and up to about 16-to-1 in the House. Bullock County, with a population of only 13,462, and Henry County, with a population of only 15,286, each were allocated two seats ***546** in the Alabama House, whereas Mobile County, with a population of 314,301, was given only three seats, and Jefferson County, with 634,864 people, had only seven representatives. [FN12] With respect to senatorial apportionment, since the pertinent Alabama constitutional provisions had been consistently construed as prohibiting the giving of more than one Senate seat to any one county, [FN13] Jefferson County, with over 600,000 people, was given only one senator, as was Lowndes County, with a 1960 population of only 15,417, and Wilcox County, with only 18,739 people. [FN14]

FN12. A comprehensive chart showing the representation by counties in the Alabama House of Representatives under the existing apportionment provisions is set out as Appendix D to the lower court's opinion. 208 F.Supp., at 447--449. This chart includes the number of House seats give to each county, and the populations of the 67 Alabama counties under the 1900, 1950, and 1960 censuses.

FN13. Although cross-appellants in No. 27 assert that the Alabama Constitution forbids the division of a county, in forming senatorial districts, only when one or both pieces will be joined with another county to form a multicounty district, this view appears to be contrary to the language of Art. IX, s 200, of the Alabama Constitution and the practice under it. Cross-appellants contend that counties entitled by population to two or more senators can be split into the appropriate number of districts, and argue that prior to the adoption of the 1901 provisions the Alabama Constitution so provided and there is no reason to believe that the language of the present provision was intended to effect any change. However, the only apportionments under the 1901 Alabama Constitution--the 1901 provisions and the Crawford-Webb Act--gave no more than one seat to a county even though by population several counties would have been entitled to additional senatorial representation.

FN14. A chart showing the composition, by counties, of the 35 senatorial districts provided for under the existing apportionment, and the population of each according to the 1900, 1950, and 1960 censuses, is reproduced as Appendix E to the lower court's opinion. 208 F.Supp., at 450.

****1374** The Court then considered both the proposed constitutional amendment and the Crawford-Webb Act to ascertain ***547** whether the legislature had taken effective action to remedy the unconstitutional aspects of the existing apportionment. In initially summarizing the result which it had reached, the Court stated:

'This Court has reached the conclusion that neither the '67-Senator Amendment,' nor the 'Crawford-Webb Act' meets the necessary constitutional requirements. We find that each of the legislative acts, when considered as a whole, is so obviously discriminatory, arbitrary and irrational that it becomes unnecessary to pursue a detailed development of each of the relevant factors of the (federal constitutional) test.' [FN15]

FN15. 208 F.Supp., at 437.

The Court stated that the apportionment of one senator to each county, under the proposed constitutional amendment, would 'make the

discrimination in the Senate even more invidious than at present.' Under the 67-Senator Amendment, as pointed out by the court below, '(t)he present control of the Senate by members representing 25.1% of the people of Alabama would be reduced to control by members representing 19.4% of the people of the State,' the 34 smallest counties, with a total population of less than that of Jefferson County, would have a majority of the senatorial seats, and senators elected by only about 14% of the State's population could prevent the submission to the electorate of any future proposals to amend the State Constitution (since a vote of two-fifths of the members of one house can defeat a proposal to amend the Alabama Constitution). Noting that the 'only conceivable rationalization' of the senatorial apportionment scheme is that it was based on equal representation of political subdivisions within the State and is thus analogous to the Federal Senate, the District Court rejected the analogy on the ground that Alabama ***548** counties are merely involuntary political units of the State created by statute to aid in the administration of state government. In finding the so-called federal analogy irrelevant, the District Court stated:

> 'The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties.' [FN16]

FN16. Id., 208 F.Supp., at 438.

The Court also noted that the senatorial apportionment proposal 'may not have complied with the State Constitution,' since not only is it explicitly provided that the population basis of legislative representation 'shall not be changed by constitutional amendments,' [FN17] but the Alabama Supreme Court had previously indicated that that requirement could probably be altered only by constitutional convention. [FN18] The Court concluded, however,****1375** that the apportionment of seats in the Alabama House, under the proposed constitutional amendment, was 'based upon reason, with a rational regard for known and accepted ***549** standards of apportionment.' [FN19] Under the proposed apportionment of representatives, each of the 67 counties was given one seat and the remaining 39 were allocated on a population basis. About 43% of the State's total population would live in counties which could elect a majority in that body. And, under the provisions of the 67-Senator Amendment, while the maximum population-variance ratio was increased to about 59-to-1 in the Senate, it was significantly reduced to about 4.7-to-1 in the House of Representatives. Jefferson County was given 17 House seats, an addition of 10, and Mobile County was allotted eight, an increase of five. The increased representation of the urban counties was achieved primarily by limiting the State's 55 least populous counties to one House seat each, and the net effect was to take 19 seats away from rural counties and allocate them to the more populous counties. Even so, serious disparities from a population-based standard remained. Montgomery County, with 169,210 people, was given only four seats, while Coosa County, with a population of only 10,726, and Cleburne County, with only 10,911, were each allocated one representative.

FN17. According to the District Court, in the interval between its preliminary order and its decision on the merits, the Alabama Legislature, despite adopting this constitutional amendment proposal, 'refused to inquire of the Supreme Court of the State of Alabama whether this provision in the Constitution of the State of Alabama could be changed by constitutional amendment as the '67-Senator Amendment' proposes.' 208 F.Supp., at 437.

FN18. At least this is the reading of the District Court of two somewhat conflicting decisions by the Alabama Supreme Court, resulting in a 'manifest uncertainty of the legality of the proposed constitutional amendment, as measured by State standards * * *.' 208 F.Supp., at 438. Compare Opinion of the Justices, 254 Ala. 183, 184, 47 So.2d 713, 714 (1950), with Opinion of the Justices, 263 Ala. 158, 164, 81 So.2d 881, 887 (1955).

FN19. See the later discussion, infra, at 1385, and note 68, infra, where we reject

the lower court's apparent conclusion that the apportionment of the Alabama House, under the 67-Senator Amendment, comported with the requirements of the Equal Protection Clause.

Turning next to the provisions of the Crawford-Webb Act, the District Court found that its apportionment of the 106 seats in the Alabama House of Representatives, by allocating one seat to each county and distributing the remaining 39 to the more populous counties in diminishing ratio to their populations, was 'totally unacceptable.' [FN20] Under this plan, about 37% of the State's total *550 population would reside in counties electing a majority of the members of the Alabama House, with a maximum population-variance ratio of about 5-to-1. Each representative from Jefferson and Mobile Counties would represent over 52,000 persons while representatives from eight rural counties would each represnet less than 20,000 people. The Court regarded the senatorial apportionment provided in the Crawford-Webb Act as 'a step in the right direction, but an extremely short step,' and but a 'slight improvement over the present system of representation.' [FN21] The net effect of combining a few of the less populous counties into two-county districts and splitting up several of the larger districts into smaller ones would be merely to increase the minority which would be represented by a majority of the members of the Senate from 25.1% to only 27.6% of the State's population. [FN22] The **1376 Court pointed out that, under the Crawford-Webb Act, the vote of a person in the senatorial district consisting of Bibb and Perry Counties would be worth 20 times that of a citizen in Jefferson County, and that the vote of a citizen in the six smallest districts would be worth 15 or more times that of a Jefferson County voter. The Court concluded that the Crawford-*551 Webb Act was 'totally unacceptable' as a 'piece of permanent legislation' which, under the Alabama Constitution, would have remained in effect without alteration at least until after the next decennial census.

FN20. While no formula for the statute's apportionment of representatives is expressly stated, one can be extrapolated. Counties with less than 45,000 people are given one seat; those with 45,000 to 90,000 receive two seats; counties with 90,000 to 150,000, three seats; those with 150,000 to 300,000, four seats; counties with 300,000 to 600,000, six seats; and counties with over 600,000 are given 12 seats.

FN21. Appendix F to the lower court's opinion sets out a chart showing the populations of the 35 senatorial districts provided for under the Crawford-Webb Act and the composition, by counties, of the various districts. 208 F.Supp., at 451.

FN22. Cross-appellants in No. 27 assert that the Crawford-Webb Act was a 'minimum-change measure' which merely redrew new senatorial district lines around the nominees of the May 1962 Democratic primary so as to retain the seats of 34 of the 35 nominees, and resulted, in practical effect, in the shift of only one Senate seat from an overrepresented district to another underpopulated, newly created district.

Under the detailed requirements of the various constitutional provisions relating to the apportionment of seats in the Alabama Senate and House of Representatives, the Court found, the membership of neither house can be apportioned solely on a population basis, despite the provision in Art. XVIII, s 284, which states that '(r)epresentation in the legislature shall be based upon population.' In dealing with the conflicting and somewhat paradoxical requirements (under which the number of seats in the House in limited to 106 but each of the 67 counties is required to be given at least one representative, and the size of the Senate is limited to 35 but it is required to have at least one-fourth of the members of the House, although no county can be given more than one senator), the District Court stated its view that 'the controlling or dominant provision of the Alabama Constitution on the subject of representation in the Legislature' is the previously referred to language of s 284. The Court stated that the detailed requirements of Art. IX, ss 197--200,

'make it obvious that in neither the House nor the Senate can representation be based strictly and entirely upon population. * * * The result may well be that representation according to

population to some extent must be required in both Houses if invidious discrimination in the legislative systems as a whole is to be avoided. Indeed, * * * it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions.' [FN23]

FN23. 208 F.Supp., at 439.

***552** The District Court then directed its concern to the providing of an effective remedy. It indicated that it was adopting and ordering into effect for the November 1962 election a provisional and temporary reapportionment plan composed of the provisions relating to the House of Representatives contained in the 67-Senator Amendment and the provisions of the Crawford-Webb Act relating to the Senate. The Court noted, however, that '(t)he proposed reapportionment of the Senate in the 'Crawford-Webb Act,' unacceptable as a piece of permanent legislation, may not even break the strangle hold.' Stating that it was retaining jurisdiction and deferring any hearing on plaintiffs' motion for a permanent injunction 'until the Legislature, as provisionally reapportioned * * *, has an opportunity to provide for a true reapportionment of both Houses of the Alabama Legislature,' the Court emphasized that its 'moderate' action was designed to break the strangle hold by the smaller counties on the Alabama Legislature and would not suffice as a permanent reapportionment. On July 25, 1962, the Court entered its decree in accordance with its previously stated determinations, concluding that 'plaintiffs * * * are denied * * * equal protection * * * by virtue of the debasement of their votes, since the Legislature of the State of Alabama has failed and continues to fail to reapportion itself (as required by law).' It enjoined the defendant state officials from holding any future elections under any of the apportionment plans that it ****1377** had found invalid, and stated that the 1962 election of Alabama legislators could validly be conducted only under the apportionment scheme specified in the Court's order.

After the District Court's decision, new primary elections were held pursuant to legislation enacted in 1962 at the same special session as the proposed constitutional amendment and the Crawford-Webb Act, to be effective ***553** in the event the Court itself ordered a particular reapportionment plan into immediate effect. The November 1962 general election was likewise conducted on the basis of the District Court's ordered apportionment of legislative seats, as Mr. Justice Black refused to stay the District Court's order. Consequently, the present Alabama Legislature is apportioned in accordance with the temporary plan prescribed by the District Court's decree. All members of both houses of the Alabama Legislature serve four-year terms, so that the next regularly scheduled election of legislators will not be held until 1966. The 1963 regular session of the Alabama Legislature produced no legislation relating to legislative apportionment, [FN24] and the legislature, which meets biennially, will not hold another regular session until 1965.

FN24. Possibly this resulted from an understandable desire on the part of the Alabama Legislature to await a final determination by this Court in the instant litigation before proceeding to enact a permanent apportionment plan.

[1] No effective political remedy to obtain relief against the alleged malapportionment of the Alabama Legislature appears to have been available. [FN25] No initiative procedure exists under Alabama law. Amendment of the State Constitution can be achieved only after a proposal is adopted by three-fifths of the members of both houses of the legislature and is approved by a majority of the people, [FN26] or as a result of a constitutional convention convened ***554** after approval by the people of a convention call initiated by a majority of both houses of the Alabama Legislature. [FN27]

FN25. However, a proposed constitutional amendment, which would have made the Alabama House of Representatives somewhat more representative of population but the Senate substantially less so, was rejected by the people in a 1956 referendum, with the more populous counties accounting for the defeat. See the discussion in Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S., pp. 736--737, 84 S.Ct., pp. 1473--1474, decided also this date, with respect to the

lack of federal constitutional significance of the presence or absence of an available political remedy.

FN26. Ala.Const., Art. XVIII, s 284.

FN27. Ala.Const., Art. XVIII, s 286.

Notices of appeal to this Court from the District Court's decision were timely filed by defendants below (appellants in No. 23) and by two groups of intervenor-plaintiffs (cross-appellants in Nos. 27 and 41). Appellants in No. 23 contend that the District Court erred in holding the existing and the two proposed plans for the apportionment of seats in the Alabama Legislature unconstitutional, and that a federal court lacks the power to affirmatively reapportion seats in a state legislature. Cross-appellants in No. 27 assert that the court below erred in failing to compel reapportionment of the Alabama Senate on a population basis as allegedly required by the Alabama Constitution and the Equal Protection Clause of the Federal Constitution. Cross-appellants in No. 41 contend that the District Court should have required and ordered into effect the apportionment of seats in both houses of the Alabama Legislature on a population basis. We noted probable jurisdiction on June 10, 1963, 374 U.S. 802, 83 S.Ct. 1692, 10 L.Ed.2d 1029.

II.

[2][3][4][5][6] Undeniably the Constitution of the United States protects the right of all qualified citizens to vote, in state as **1378 well as in federal elections. A consistent line of decisions by this Court in cases involving attempts to deny or restrict the right of suffrage has made this indelibly clear. It has been repeatedly recognized that all qualified voters have a constitutionally protected right to vote, Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274, and to have their votes counted, United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355. In Mosley the Court stated that it is 'as equally unquestionable that the right to have one's vote counted is as open to protection * * * as the right to put a ballot in a box.' *555238 U.S., at 386, 35 S.Ct., at 905. The right to vote can neither be denied outright, Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, nor destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, nor diluted by ballot-box stuffing Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717, United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341. As the Court stated in Classic, 'Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted * * *.' 313 U.S., at 315, 61 S.Ct., at 1037. Racially based gerrymandering, Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, and the conducting of white primaries, Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759, Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152, both of which result in denying to some citizens their right to vote, have been held to be constitutionally impermissible. And history has seen a continuing expansion of the scope of the right of suffrage in this country. [FN28] The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. [FN29]

FN28. The Fifteenth, Seventeenth, Nineteenth, Twenty-third and Twenty-fourth Amendments to the Federal Constitution all involve expansions of the right of suffrage. Also relevant, in this regard, is the civil rights legislation enacted by Congress in 1957 and 1960.

FN29. As stated by MR. JUSTICE DOUGLAS, dissenting, in South v. Peters, 339 U.S. 276, 279, 70 S.Ct. 641, 643, 94 L.Ed. 834.
'There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. * * * It also includes the right to have the vote counted at full value without dilution or

> discount. * * * That federally protected right suffers substantial dilution * * * (where a) favored group has full voting strength. * * * (and) (t)he groups not in favor have their votes discounted.'

***556** In Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, we held that a claim asserted under the Equal Protection Clause challenging the constitutionality of a State's apportionment of seats in its legislature, on the ground that the right to vote of certain citizens was effectively impaired since debased and diluted, in effect presented a justiciable controversy subject to adjudication by federal courts. The spate of similar cases filed and decided by lower courts since our decision in Baker amply shows that the problem of state legislative malapportionment is one that is perceived to exist in a large number of the States. [FN30] In Baker, a suit involving an attack on the ****1379** apportionment of seats in the Tennessee Legislature, we remanded to the District Court, which had dismissed the action, for consideration on the merits. We intimated no view as to the proper constitutional standards for evaluating the validity of a state legislative apportionment scheme. Nor did we give any consideration to the question of appropriate remedies. Rather, we simply stated:

> FN30. Litigation challenging the constitutionality of state legislative apportionment schemes had been instituted in at least 34 States prior to the end of 1962--within nine months of our decision in Baker v. Carr. See McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 Mich.L.Rev. 645, 706--710 (1963), which contains an appendix summarizing reapportionment litigation through the end of 1962. See also David and Eisenberg, Devaluation of the Urban and Suburban Vote (1961); Goldberg, The Statistics of Malapportionment, 72 Yale L.J. 90 (1962).

'Beyond noting that we have no cause at this stage to doubt the District Court will be able to fashion relief if violations of constitutional rights are found, it is improper now to consider what remedy would be most appropriate if appellants prevail at the trial.' [FN31]

> FN31. 369 U.S., at 198, 82 S.Ct., at 699.

***557** We indicated in Baker, however, that the Equal Protection Clause provides discoverable and manageable standards for use by lower courts in determining the constitutionality of a state legislative apportionment scheme, and we stated:

'Nor need the appellants, in order to succeed in this action, ask the Court to enter upon policy determinations for which judicially manageable standards are lacking. Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.' [FN32]

> FN32. Id., 369 U.S., at 226, 82 S.Ct., at 715.

Subsequent to Baker, we remanded several cases to the courts below for reconsideration in light of that decision. [FN33]

> FN33. Scholle v. Hare, 369 U.S. 429, 82 S.Ct. 910, 8 L.Ed.2d 1 (Michigan); WMCA, Inc., v. Simon, 370 U.S. 190, 82 S.Ct. 1234, 8 L.Ed.2d 430 (New York).

In Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821, we held that the Georgia county unit system, applicable in statewide primary elections, was unconstitutional since it resulted in a dilution of the weight of the votes of certain Georgia voters merely because of where they resided. After indicating that the Fifteenth and Nineteenth Amendments prohibit a State from overweighting or diluting votes on the basis of race or sex, we stated:

'How then can one person be given twice or 10 times the voting power of another person in a statewide election merely because he lives in a rural area or because he lives in the smallest rural county? Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote--whatever their race, whatever their sex, whatever their occupation, ***558** whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth

Amendment. The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.' [FN34]

FN34. 372 U.S., at 379--380, 83 S.Ct., at 808.

Continuing, we stated that 'there is no indication in the Constitution that homesite or occupation affords a permissible basis for distinguishing between qualified **1380 voters within the State.' And, finally, we concluded: 'The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing--one person, one vote.' [FN35]

FN35. Id., 372 U.S., at 381, 83 S.Ct., at 809.

We stated in Gray, however, that that case,

'unlike Baker v. Carr, * * * does not involve a question of the degree to which the Equal Protection Clause of the Fourteenth Amendment limits the authority of a State legislature in designing the geographical districts from which representatives are chosen either for the State Legislature or for the Federal House of Representatives. * * * Nor does it present the question, inherent in the bicameral form of our Federal Government, whether a State may have one house chosen without regard to population.' [FN36]

FN36. Id., 372 U.S., at 376, 83 S.Ct., at 806. Later in the opinion we again stated: 'Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate no opinion on the constitutional phases of that problem beyond what we said in Baker v. Carr * * *.' Id., 372 U.S., at 378, 83 S.Ct. at 807.

*559 Of course, in these cases we are faced with the problem not presented in Gray--that of determining the basic standards and stating the applicable guidelines for implementing our decision in Baker v. Carr.

In Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481, decided earlier this Term, we held that attacks on the constitutionality of congressional districting plans enacted by state legislatures do not present nonjusticiable questions and should not be dismissed generally for 'want of equity.' We determine that the constitutional test for the validity of congressional districting schemes was one of substantial equality of population among the various districts established by a state legislature for the election of members of the Federal House of Representatives.

In that case we decided that an apportionment of congressional seats which 'contracts the value of some votes and expands that of others' is unconstitutional, since 'the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote * * *.' We concluded that the constitutional prescription for election of members of the House of Representatives 'by the People,' construed in its historical context, 'means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's.' We further stated:

'It would defeat the principle solemnly embodied in the Great Compromise-- equal representation in the House for equal numbers of people--for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others.' [FN37]

FN37. 376 U.S., at 14, 84 S.Ct., at 533.

We found further, in Wesberry, that 'our Constitution's plain objective' was that 'of making equal representation *560 for equal numbers of people the fundamental goal * * *.' We concluded by stating:

'No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of

people in a way that unnecessarily abridges this right.' [FN38]

FN38. Id., 376 U.S., at 17--18, 84 S.Ct., at 535.

****1381** [7] Gray and Wesberry are of course not dispositive of or directly controlling on our decision in these cases involving state legislative apportionment controversies. Admittedly, those decisions, in which we held that, in statewide and in congressional elections, one person's vote must be counted equally with those of all other voters in a State, were based on different constitutional considerations and were addressed to rather distinct problems. But neither are they wholly inapposite. Gray, though not determinative here since involving the weighting of votes in statewide elections, established the basic principle of equality among voters within a State, and held that voters cannot be classified, constitutionally, on the basis of where they live, at least with respect to voting in statewide elections. And our decision in Wesberry was of course grounded on that language of the Constitution which prescribes that members of the Federal House of Representatives are to be chosen 'by the People,' while attacks on state legislative apportionment schemes, such as that involved in the instant cases, are principally based on the Equal Protection Clause of the Fourteenth Amendment. Nevertheless, Wesberry clearly established that the fundamental principle of representative government in this country is one of equal ***561** representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State. Our problem, then, is to ascertain, in the insant cases, whether there are any constitutionally cognizable principles which would justify departures from the basic standard of equality among voters in the apportionment of seats in state legislatures.

[8][9][10] A predominant consideration in determining whether a State's legislative apportionment scheme constitutes an invidious discrimination violative of rights asserted under the Equal Protection Clause is that the rights allegedly impaired are individual and personal in nature. As stated by the Court in United States v. Bathgate, 246 U.S. 220, 227, 38 S.Ct. 269, 271, 62 L.Ed. 676, '(t)he right to vote is personal * * *.' [FN39] While the result of a court decision in a state legislative apportionment controversy may be to require the restructuring of the geographical distribution of seats in a state legislature, the judicial focus must be concentrated upon ascertaining whether there has been any discrimination against certain of the State's citizens which constitutes an impermissible impairment of their constitutionally protected right to vote. Like Skinner v. Oklahoma, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655, such a case 'touches a sensitive and important area of human rights,' and 'involves one of the basic civil rights of man,' presenting questions of alleged 'invidious discriminations * * * against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.' 316 U.S., at 536, 541, 62 S.Ct., at 1113. Undoubtedly, the right of suffrage is a fundamental matter ***562** in â free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized. Almost a century ago, in Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220, the Court referred to 'the political franchise of voting' as 'a fundamental political right, because preservative of all rights.' 118 U.S., at 370, 6 S.Ct., at 1071.

FN39. As stated by MR. JUSTICE DOUGLAS, the rights sought to be vindicated in a suit challenging an apportionment scheme are 'personal and individual,' South v. Peters, 339 U.S., at 280, 70 S.Ct., at 643, 94 L.Ed. 834, and are 'important political rights of the people,' MacDougall v. Green, 335 U.S. 281, 288, 69 S.Ct. 1, 4, 93 L.Ed. 3. (DOUGLAS, J., dissenting.)

****1382** [11][12][13][14] Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests. As long as ours is a representative form of government, and our legislatures are those instruments of government elected directly by and directly representative of the people, the right to elect legislators in a free and unimpaired fashion is a bedrock of our political system. It could hardly be gainsaid that a constitutional claim had been

asserted by an allegation that certain otherwise qualified voters had been entirely prohibited from voting for members of their state legislature. And, if a State should provide that the votes of citizens in one part of the State should be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. It would appear extraordinary to suggest that a State could be constitutionally permitted to enact a law providing that certain of the State's voters could vote two, five, or 10 times for their legislative representatives, while voters living elsewhere could vote only once. And it is inconceivable that a state law to the effect that, in counting votes for legislators, the votes of citizens in one part of the State would be multiplied by two, five, or 10, while the votes of persons in another area would be counted only at face value, could be constitutionally sustainable. Of course, the effect of ***563** state legislative districting schemes which give the same number of representatives to unequal numbers of constituents is identical. [FN40] Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor. Weighting the votes of citizens differently, by any method or means, merely because of where they happen to reside, hardly seems justifiable. One must be ever aware that the Constitution forbids 'sophisticated as well as simpleminded modes of discrimination.' Lane v. Wilson, 307 U.S. 268, 275, 59 S.Ct. 872, 876, 83 L.Ed. 1281; Gomillion v. Lightfoot, 364 U.S. 339, 342, 81 S.Ct. 125, 127, 5 L.Ed.2d 110. As we stated in Wesberry v. Sanders, supra:

> FN40. As stated by MR. JUSTICE BLACK, dissenting, in Colegrove v. Green, 328 U.S. 549, 569--571, 66 S.Ct. 1198, 1210, 90 L.Ed. 1432: 'No one would deny that the equal protection clause would * * * prohibit a law that would expressly give certain citizens a half-vote and others a full vote. * * * (T)he Constitutionally guaranteed right to vote and the right to have one's vote counted clearly imply the policy that state election systems, no matter what their form, should be designed to give approximately equal weight to each vote cast. * * * (A) state legislature cannot deny eligible voters the right to vote for Congressmen and the right to have their vote counted. It can no more destroy the effectiveness of their vote in part and no more accomplish this in the name of 'apportionment' than under any other name.'

'We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth ***564** more in one district than in another would * * * run counter to our fundamental ideas of democratic government * * *.' [FN41]

> FN41. 376 U.S., at 8, 84 S.Ct., at 530. See also id., at 17, 84 S.Ct., at 535, quoting from James Wilson, a delegate to the Constitutional Convention and later an Associate Justice of this Court, who stated:
> '(A)ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.' 2 The Works of James Wilson (Andrews ed. 1896) 15. And, as stated by MR. JUSTICE DOUGLAS, dissenting, in MacDougall v. Green, 335 U.S., at 288, 290, 69 S.Ct., at 4:
> '(A) regulation * * * (which) discriminates against the residents of the populous counties of the state in favor of rural sections. * * * lacks the equality to which the exercise of political rights is entitled under the Fourteenth Amendment.
> 'Free and honest elections are the very foundation of our republican form of

> government. * * * Discrimination against any group or class of citizens in the exercise of these constitutionally protected rights of citizenship deprives the electoral process of integrity. * * *
> 'None would deny that a state law giving some citizens twice the vote of other citizens in either the primary or general election would lack that equality which the Fourteenth Amendment guarantees. * * * The theme of the Constitution is equality among citizens in the exercise of their political rights. The notion that one group can be granted greater voting strength than another is hostile to our standards for popular representative government.'

****1383** [15] State legislatures are, historically, the fountainhead of representative government in this country. A number of them have their roots in colonial times, and substantially antedate the creation of our Nation and our Federal Government. In fact, the first formal stirrings of American political independence are to be found, in large part, in the views and actions of several of the colonial legislative bodies. With the birth of our National Government, and the adoption and ratification of the Federal ***565** Constitution, state legislatures retained a most important place in our Nation's governmental structure. But representative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less.

[16][17][18][19] Logically, in a society ostensibly grounded on representative government, it would seem reasonable that a majority of the people of a State could elect a majority of that State's legislators. To conclude differently, and to sanction minority control of state legislative bodies, would appear to deny majority rights in a way that far surpasses any possible denial of minority rights that might otherwise be thought to result. Since legislatures are responsible for enacting laws by which all citizens are to be governed, they should be bodies which are collectively responsive to the popular will. And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. With respect to the allocation of legislative representation, all voters, as citizens of a State, stand in the same relation regardless of where they live. Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment. Since the achieving of fair and effective representation for all citizens ***566** is concededly the basic aim of legislative apportionment, we conclude ****1384** that the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race, Brown v. Board of Education, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873, or economic status, Griffin v. People of State of Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891, Douglas v. People of State of California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811. Our constitutional system amply provides for the protection of minorities by means other than giving them majority control of state legislatures. And the democratic ideals of equality and majority rule, which have served this Nation so well in the past, are hardly of any less significance for the present and the future.

[20][21][22][23][24][25] We are told that the matter of apportioning representation in a state legislature is a complex and many-faceted one. We are advised that States can rationally consider factors other than population in apportioning legislative representation. We are admonished not to restrict the power of the States to impose differing views as to political philosophy on their citizens. We are cautioned about the dangers of entering into political thickets and mathematical quagmires. Our answer is this: a denial of

constitutionally protected rights demands judicial protection; our oath and our office require no less of us. As stated in Gomillion v. Lightfoot, supra:

'When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right.' [FN42]

FN42. 364 U.S., at 347, 81 S.Ct., at 130.

***567** To the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote. The complexions of societies and civilizations change, often with amazing rapidity. A nation once primarily rural in character becomes predominantly urban. [FN43] Representation schemes once fair and equitable become archaic and outdated. But the basic principle of representative government remains, and must remain, unchanged--the weight of a citizen's vote cannot be made to depend on where he lives. Population is, of necessity, the starting point for consideration and the controlling criterion for judgment in legislative apportionment controversies. [FN44] ***568** A citizen, a qualified ****1385** voter, is no more nor no less so because he lives in the city or on the farm. This is the clear and strong command of our Constitution's Equal Protection Clause. This is an essential part of the concept of a government of laws and not men. This is at the heart of Lincoln's vision of 'government of the people, by the people, (and) for the people.' The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races.

FN43. Although legislative apportionment controversies are generally viewed as involving urban-rural conflicts, much evidence indicates that presently it is the fast-growing suburban areas which are probably the most seriously underrepresented in many of our state legislatures. And, while currently the thrust of state legislative malapportionment results, in most States, in underrepresentation of urban and suburban areas, in earlier times cities were in fact overrepresented in a number of States. In the early 19th century, certain of the seaboard cities in some of the Eastern and Southern States possessed and struggled to retain legislative representation disproportionate to population, and bitterly opposed according additional representation to the growing inland areas. Conceivably, in some future time, urban areas might again be in a situation of attempting to acquire or retain legislative representation in excess of that to which, on a population basis, they are entitled. Malapportionment can, and has historically, run in various directions. However and whenever it does, it is constitutionally impermissible under the Equal Protection Clause.

FN44. The British experience in eradicating 'rotten boroughs' is interesting and enlightening. Parliamentary representation is now based on districts of substantially equal population, and periodic reapportionment is accomplished through independent Boundary Commissions. For a discussion of the experience and difficulties in Great Britain in achieving fair legislative representation, see Edwards, Theoretical and Comparative Aspects of Reapportionment and Redistricting: With Reference to Baker v. Carr, 15 Vand.L.Rev. 1265, 1275 (1962). See also the discussion in Baker v. Carr, 369 U.S., at 302--307, 82 S.Ct., at 756--759, 7 L.Ed.2d 663. (Frankfurter, J., dissenting.)

IV.

[26][27][28][29] We hold that, as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis. Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State. Since, under neither the existing apportionment

provisions nor either of the proposed plans was either of the houses of the Alabama Legislature apportioned on a population basis, the District Court correctly held that all three of these schemes were constitutionally invalid. Furthermore, the existing apportionment, and also to a lesser extent the apportionment under the Crawford-Webb Act, presented little more than crazy quilts, completely lacking in rationality, and could be found invalid on that basis alone. [FN45] Although ***569** the District Court presumably found the apportionment of the Alabama House of Representatives under the 67-Senator Amendment to be acceptable, we conclude that the deviations from a strict population basis are too egregious to permit us to find that that body, under this proposed plan, was apportioned sufficiently on a population basis so as to permit the arrangement to be constitutionally sustained. Although about 43% of the State's total population would be required to comprise districts which could elect a majority in that body, only 39 of the 106 House seats were actually to be distributed on a population basis, as each of Alabama's 67 counties was given at least one representative, and population-variance ratios of close to 5-to-1 would have existed. While mathematical nicety is not a constitutional requisite, one could hardly conclude that the Alabama House, under the proposed constitutional amendment, had been apportioned sufficiently on a population basis to be sustainable under the requirements of the Equal Protection Clause. And none of the other apportionments of seats in either of the bodies of the Alabama Legislature under the three plans considered by the District Court, came nearly as close to approaching the required constitutional standard as did that of the House of Representatives under the 67-Senator Amendment.

> FN45. Under the existing scheme, Marshall County, with a 1960 population of 48,018, Baldwin County, with 49,088, and Houston County, with 50,718, are each given only one seat in the Alabama House, while Bullock County, with only 13,462, Henry County, with 15,286, and Lowndes County, with 15,417, are allotted two representatives each. And in the Alabama Senate, under the existing apportionment, a district comprising Lauderdale and Limestone Counties had a 1960 population of 98,135, and another composed of Lee and Russell Counties had 96,105. Conversely, Lowndes County, with only 15,417, and Wilcox County, with 18,739, are nevertheless single-county senatorial districts given one Senate seat each.

****1386** [30] Legislative apportionment in Alabama is signally illustrative and symptomatic of the seriousness of this problem in a number of the States. At the time this litigation was commenced, there had been no reapportionment ***570** of seats in the Alabama Legislature for over 60 years. [FN46] Legislative inaction, coupled with the unavailability of any political or judicial remedy, [FN47] had resulted, with the passage of years, in the perpetuated scheme becoming little more than an irrational anachronism. Consistent failure by the Alabama Legislature to comply with state constitutional requirements as to the frequency of reapportionment and the bases of legislative representation resulted in a minority strangle hold on the State Legislature. Inequality of representation in one house added to the inequality in the other. With the crazy-quilt existing apportionment virtually conceded to be invalid, the Alabama Legislature offered two proposed plans for consideration by the District Court, neither of which was to be effective until 1966 and neither of which provided for the apportionment of even one of the two houses on a population basis. We find that the court below did not err in holding that neither of these proposed reapportionment schemes, considered as a whole 'meets the necessary constitutional requirements.' And we conclude that the District Court acted properly in considering these two proposed plans, although neither was to become effective until the 1966 election and the proposed constitutional amendment was scheduled to be submitted to the State's voters in November 1962. [FN48] ***571** Consideration by the court below of the two proposed plans was clearly necessary in determining whether the Alabama Legislature had acted effectively to correct the admittedly existing malapportionment, and in ascertaining what sort of judicial relief, if any, should be afforded.

> FN46. An interesting pre-Baker discussion of the problem of legislative malapportionment in Alabama is provided

in Comment, Alabama's Unrepresentative Legislature, 14 Ala.L.Rev. 403 (1962).

FN47. See the cases cited and discussed in notes 4--5, supra, where the Alabama Supreme Court refused even to consider the granting of relief in suits challenging the validity of the apportionment of seats in the Alabama Legislature, although it stated that the legislature had failed to comply with the requirements of the State Constitution with respect to legislative reapportionment.

FN48. However, since the District Court found the proposed constitutional amendment prospectively invalid, it was never in fact voted upon by the State's electorate.

V.

[31][32] Since neither of the houses of the Alabama Legislature, under any of the three plans considered by the District Court, was apportioned on a population basis, we would be justified in proceeding no further. However, one of the proposed plans, that contained in the so-called 67-Senator Amendment, at least superficially resembles the scheme of legislative representation folowed in the Federal Congress. Under this plan, each of Alabama's 67 counties is allotted one senator, and no counties are given more than one Senate seat. Arguably, this is analogous to the allocation of two Senate seats, in the Federal Congress, to each of the 50 States, regardless of population. Seats in the Alabama House, under the proposed constitutional amendment, are distributed by giving each of the 67 counties at least one, with the remaining 39 seats being allotted among the more populous counties on a population basis. This scheme, at least at first glance, appears to resemble that prescribed for the Federal House of Representatives, where the 435 seats are distributed among the States on a population basis, although each State, regardless of its population, is given at least one Congressman. Thus, although there are substantial differences **1387 in underlying rationale and result, [FN49] *572 the 67-Senator Amendment, as proposed by the Alabama Legislature, at least arguably presents for consideration a scheme analogous to that used for apportioning seats in Congress.

FN49. Resemblances between the system of representation in the Federal Congress and the apportionment scheme embodied in the 67-Senator Amendment appear to be more superficial than actual. Representation in the Federal House of Representatives is apportioned by the Constitution among the States in conformity with population. While each State is guaranteed at least one seat in the House, as a feature of our unique federal system, only four States have less than 1/435 of the country's total population, under the 1960 census. Thus, only four seats in the Federal House are distributed on a basis other than strict population. In Alabama, on the other hand, 40 of the 67 counties have less than 1/106 of the State's total population. Thus, under the proposed amendment, over 1/3 of the total number of seats in the Alabama House would be distributed on a basis other than strict population. States with almost 50% of the Nation's total population are required in order to elect a majority of the members of the Federal House, though unfair districting within some of the States presently reduces to about 42% the percentage of the country's population which reside in districts electing individuals comprising a majority in the Federal House. Cf. Wesberry v. Sanders, supra, holding such congressional districting unconstitutional. Only about 43% of the population of Alabama would live in districts which could elect a majority in the Alabama House, under the proposed constitutional amendment. Thus, it could hardly be argued that the proposed apportionment of the Alabama House was based on population in a way comparable to the apportionment of seats in the Federal House among the States.

Much has been written since our decision in Baker v. Carr about the applicability of the so-called federal analogy to state legislative apportionment arrangements. [FN50] After considering the matter,

the court below concluded that no conceivable analogy could be drawn between the federal scheme and the apportionment of seats in the Alabama Legislature under the proposed constitutional ***573** amendment. [FN51] We agree with the District Court, and find the federal analogy inapposite and irrelevant to state legislative districting schemes. Attempted reliance on the federal analogy appears often to be little more than an after-the-fact rationalization offered in defense of maladjusted state apportionment arrangements. The original constitutions of 36 of our States provided that representation in both houses of the state legislatures would be based completely, or predominantly, on population. [FN52] And the Founding Fathers clearly had no intention of establishing a pattern or model for the apportionment of seats in state legislatures when the system of representation in the Federal Congress was adopted. [FN53] Demonstrative of this is the fact that the Northwest Ordinance, ****1388** adopted in the same year, 1787, as the Federal Constitution, provided for the apportionment of seats in territorial legislatures solely on the basis of population. [FN54]

FN50. For a thorough statement of the arguments against holding the so-called federal analogy applicable to state legislative apportionment matters, see, e.g., McKay, Reapportionment and the Federal Analogy (National Municipal League pamphlet 1962); McKay, The Federal Analogy and State Apportionment Standards, 38 Notre Dame Law. 487 (1963). See also Merrill, Blazes for a Trail Through the Thicket of Reapportionment, 16 Okla.L.Rev. 59, 67--70 (1963).

FN51. 208 F.Supp., at 438. See the discussion of the District Court's holding as to the applicability of the federal analogy earlier in this opinion, supra, at 1374.

FN52. Report of Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures 10--11, 35, 69 (1962).

FN53. Thomas Jefferson repeatedly denounced the inequality of representation provided for under the 1776 Virginia Constitution and frequently proposed changing the State Constitution to provide that both houses be apportioned on the basis of population. In 1816 he wrote that 'a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns * * * by representatives chosen by himself * * *.' Letter to Samuel Kercheval, 10 Writings of Thomas Jefferson (Ford ed. 1899) 38. And a few years later, in 1819, he stated: 'Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified.' Letter to William King, Jefferson Papers, Library of Congress, Vol. 216, p. 38616.

FN54. Article II, s 14, of the Northwest Ordinance of 1787 stated quite specifically: 'The inhabitants of the said territory shall always be entitled to the benefits * * * of a proportionate representation of the people in the legislature.'

***574** [33] The system of representation in the two Houses of the Federal Congress is one ingrained in our Constitution, as part of the law of the land. It is one conceived out of compromise and concession indispensable to the establishment of our federal republic. [FN55] Arising from unique historical circumstances, it is based on the consideration that in establishing our type of federalism a group of formerly independent States bound themselves together under one national government. Admittedly, the original 13 States surrendered some of their sovereignty in agreeing to join together 'to form a more perfect Union.' But at the heart of our constitutional system remains the concept of separate and distinct governmental entities which have delegated some, but not all, of their formerly held powers to the single national government. The fact that almost three-fourths of our present States were never in fact independently sovereign does not detract from our view that the so-called federal analogy is inapplicable as a sustaining precedent for

state legislative apportionments. The developing history and growth of our republic cannot cloud the fact that, at the time of the inception of the system of representation in the Federal Congress, a compromise between the larger and smaller States on this matter averted a deadlock in the Constitutional Convention which had threatened to abort the birth of our Nation. In rejecting an asserted analogy to the federal electoral college in Gray v. Sanders, supra, we stated:

> FN55. See the discussion in Wesberry v. Sanders, 376 U.S., at 9-- 14, 84 S.Ct., at 530--533, 11 L.Ed.2d 481.

> 'We think the analogies to the electoral college, to districting and redistricting, and to other phases of the problems of representation in state or federal legislatures or conventions are inapposite. The inclusion of the electoral college in the Constitution, as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use of ***575** an analogous system by a State in a statewide election. No such specific accommodation of the latter was ever undertaken, and therefore no validation of its numerical inequality ensued.' [FN56]

> FN56. 372 U.S., at 378, 83 S.Ct., at 807, 9 L.Ed.2d 821.

[34][35] Political subdivisions of States--counties, cities, or whatever--never were and never have been considered as sovereign entities. Rather, they have been traditionally regarded as subordinate governmental instrumentalities created by the State to assist in the carrying out of state governmental functions. As stated by the Court in Hunter v. City of Pittsburgh, 207 U.S. 161, 178, 28 S.Ct. 40, 46, 52 L.Ed. 151, these governmental units are 'created as convenient agencies for exercising such of the governmental powers of the state as may be entrusted to them,' and the 'number, nature, and duration of the powers conferred upon (them) * * * and the territory over which they shall be exercised rests in the absolute discretion of the state.' The relationship of ****1389** the States to the Federal Government could hardly be less analogous.

[36] Thus, we conclude that the plan contained in the 67-Senator Amendment for apportioning seats in the Alabama Legislature cannot be sustained by recourse to the so-called federal analogy. Nor can any other inequitable state legislative apportionment scheme be justified on such an asserted basis. This does not necessarily mean that such a plan is irrational or involves something other than a 'republican form of government.' We conclude simply that such a plan is impermissible for the States under the Equal Protection Clause, since perforce resulting, in virtually every case, in submergence of the equal-population principle in at least one house of a state legislature.

Since we find the so-called federal analogy inapposite to a consideration of the constitutional validity of state ***576** legislative apportionment schemes, we necessarily hold that the Equal Protection Clause requires both houses of a state legislature to be apportioned on a population basis. The right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens in the election of members of one house of a bicameral state legislature would amount to little if States could effectively submerge the equal-population principle in the apportionment of seats in the other house. If such a scheme were permissible, an individual citizen's ability to exercise an effective voice in the only instrument of state government directly representative of the people might be almost as effectively thwarted as if neither house were apportioned on a population basis. Deadlock between the two bodies might result in compromise and concession on some issues. But in all too many cases the more probable result would be frustration of the majority will through minority veto in the house not apportioned on a population basis, stemming directly from the failure to accord adequate overall legislative representation to all of the State's citizens on a nondiscriminatory basis. In summary, we can perceive no constitutional difference, with respect to the geographical distribution of state legislative representation, between the two houses of a bicameral state legislature.

[37] We do not believe that the concept of bicameralism is rendered anachronistic and meaningless when the predominant basis of representation in the two state legislative bodies is

required to be the same--population. A prime reason for bicameralism, modernly considered, is to insure mature and deliberate consideration of, and to prevent precipitate action on, proposed legislative measures. Simply because the controlling criterion for apportioning representation is required to be the same in both houses does not mean that there will be no differences in the composition and complexion of the two bodies. Different ***577** constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts. The length of terms of the legislators in the separate bodies could differ. The numerical size of the two bodies could be made to differ, even significantly, and the geographical size of districts from which legislators are elected could also be made to differ. And apportionment in one house could be arranged so as to balance off minor inequities in the representation of certain areas in the other house. In summary, these and other factors could be, and are presently in many States, utilized to engender differing complexions and collective attitudes in the two bodies of a state legislature, although both are apportioned substantially on a population basis.

VI.

[38] By holding that as a federal constitutional requisite both houses of a state legislature must be apportioned ****1390** on a population basis, we mean that the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable. We realize that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. Mathematical exactness or precision is hardly a workable constitutional requirement. [FN57]

> FN57. As stated by the Court in Bain Peanut Co. v. Pinson, 282 U.S. 499, 501, 51 S.Ct. 228, 229, 75 L.Ed. 482, 'We must remember that the machinery of government would not work if it were not allowed a little play in its joints.'

[39][40][41] In Wesberry v. Sanders, supra, the Court stated that congressional representation must be based on population as nearly as is practicable. In implementing the basic constitutional principle of representative government as enunciated by the Court in Wesberry--equality of population ***578** among districts--some distinctions may well be made between congressional and state legislative representation. Since, almost invariably, there is a significantly larger number of seats in state legislative bodies to be distributed within a State than congressional seats, it may be feasible to use political subdivision lines to a greater extent in establishing state legislative districts than in congressional districting while still affording adequate representation to all parts of the State. To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and the equal-population principle ws not diluted in any significant way. Somewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in congressional districting. Lower courts can and assuredly will work out more concrete and specific standards for evaluating state legislative apportionment schemes in the context of actual litigation. For the present, we deem it expedient not to attempt to spell out any precise constitutional tests. What is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case. Developing a body of doctrine on a case-by-case basis appears to us to provide the most satisfactory means of arriving at detailed constitutional requirements in the area of state legislative apportionment. Cf. Slaughter-House Cases, 16 Wall. 36, 78--79, 21 L.Ed. 394. Thus, we proceed to state here only a few rather general considerations which appear to us to be relevant.

[42][43] A State may legitimately desire to maintain the integrity of various political subdivisions, insofar as possible, and provide for compact districts of contiguous territory in designing a legislative apportionment scheme. Valid considerations may underlie such aims. Indiscriminate districting, without any regard for political subdivision or ***579** natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering. Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember [FN58] or

floterial districts. [FN59] Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.

FN58. But cf. the discussion of some of the practical problems inherent in the use of multimember districts in Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S., pp. 731--732, 84 S.Ct., p. 1471, decided also this date.

FN59. See the discussion of the concept of floterial districts in Davis v. Mann, 377 U.S., pp. 686--687, 84 S.Ct., p. 1445, n. 2, decided also this date.

[44][45][46][47] History indicates, however, that many States have deviated, to a ****1391** greater or lesser degree, from the equal-population principle in the apportionment of seats in at least one house of their legislatures. [FN60] So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature. But neither history alone, [FN61] nor economic or other sorts of ***580** group interests, are permissible factors in attempting to justify disparties from population-based representation. Citizens, not history or economic interests, cast votes. Considerations of area alone provide an insufficient justification for deviations from the equal-population principle. Again, people, not land or trees or pastures, vote. Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.

FN60. For a discussion of the formal apportionment formulae prescribed for the allocation of seats in state legislatures, see Dixon, Apportionment Standards and Judicial Power, 38 Notre Dame Law, 367, 398-- 400 (1963). See also The Book of the States 1962--1963, 58--62.

FN61. In rejecting a suggestion that the representation of the newer Western States in Congress should be limited so that it would never exceed that of the original States, the Constitutional Convention plainly indicated its view that history alone provided an unsatisfactory basis for differentiations relating to legislative representation. See Wesberry v. Sanders, 376 U.S., at 14, 84 S.Ct., at 533. Instead, the Northwest Ordinance of 1787, in explicitly providing for population-based representation of those living in the Northwest Territory in their territorial legislatures, clearly implied that, as early as the year of the birth of our federal system, the proper basis of legislative representation was regarded as being population.

[48][49][50][51][52][53] A consideration that appears to be of more substance in justifying some deviations from population-based representation in state legislatures is that of insuring some voice to political subdivisions, as political subdivisions. Several factors make more than insubstantial claims that a State can rationally consider according political subdivisions some independent representation in at least one body of the state legislature, as long as the basic standard of equality of population among districts is maintained. Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local ***581** legislation, directed only to the concerns of particular political subdivisions. And a State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering. However, permitting deviations from population-based representation does not mean that each local governmental unit or political subdivision can be

given separate representation, regardless of population. Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-population principle in that legislative body. [FN62] This would be especially true in a State where the number of counties is large and many **1392 of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties. [FN63] Such a result, we conclude, would be constitutionally impermissible. And careful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis. But if, even as a result of a clearly rational state policy of according some legislative representation to political subdivisions, population is submerged as the controlling consideration in the apportionment of seats in the particular legislative body, then the right of all of the State's citizens to cast an effective and adequately weighted vote would be unconstitutionally impaired.

FN62. See McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 MichL.Rev. 645, 698--699 (1963).

FN63. Determining the size of its legislative bodies is of course a matter within the discretion of each individual State. Northing in this opinion should be read as indicating that there are any federal constitutional maximums or minimums on the size of state legislative bodies.

*582 VII.

[54][55][56][57][58][59] One of the arguments frequently offered as a basis for upholding a State's legislative apportionment arrangement, despite substantial disparities from a population basis in either or both houses, is grounded on congressional approval, incident to admitting States into the Union, of state apportionment plans containing deviations from the equal-population principle. Proponents of this argument contend that congressional approval of such schemes, despite their disparities from population-based representation, indicates that such arrangements are plainly sufficient as establishing a 'republican form of government.' As we stated in Baker v. Carr, some questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards. [FN64] Nevertheless, it is not inconsistent with this view to hold that, despite congressional approval of state legislative apportionment plans at the time of admission into the Union, even though deviating from the equal-population principle here enunciated, the Equal Protection Clause can and does require more. And an apportionment scheme in which both houses are based on population can hardly be considered as failing to satisfy the Guaranty Clause requirement. Congress presumably does not assume, in admitting States into the Union, to pass on all constitutional questions relating to the character of state governmental organization. In any event, congressional approval, however well-considered, could hardly validate an unconstitutional state legislative apportionment. Congress simply lacks the constitutional power to insulate States from attack with respect to alleged deprivations of individual constitutional rights.

FN64. See 369 U.S., at 217--232, 82 S.Ct., at 710--718, 7 L.Ed.2d 663, discussing the nonjusticiability of malapportionment claims asserted under the Guaranty Clause.

*583 VIII.

[60] That the Equal Protection Clause requires that both houses of a state legislature be apportioned on a population basis does not mean that States cannot adopt some reasonable plan for periodic revision of their apportionment schemes. Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth. Reallocation of legislative seats every 10 years coincides with the prescribed practice in 41 of the States, [FN65] often honored more in **1393 the breach than the observance, however, Illustratively, the Alabama Constitution requires decennial reapportionment, yet the last reapportionment of the Alabama Legislature, when this suit was brought,

was in 1901. Limitations on the frequency of reapportionment are justified by the need for stability and continuity in the organization of the legislative system, although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period and also to the development of resistance to change on the part of some incumbent legislators. In substance, we do not regard the Equal Protection Clause as requiring daily, monthly, annual or biennial reapportionment, so long as a State has a reasonably conceived plan for periodic readjustment of legislative representation. While we do not intend to indicate that decennial reapportionment is a constitutional requisite, compliance with such an approach would clearly meet the minimal ***584** requirements for maintaining a reasonably current scheme of legislative representation. And we do not mean to intimate that more frequent reapportionment would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect.

FN65. Report of Advisory Commission on Intergovernmental Relations, Apportionment of State Legislatures 56 (1962). Additionally, the constitutions of seven other States either require or permit reapportionment of legislative representation more frequently than every 10 years. See also The Book of the States 1962--1963, 58--62.

IX.

[61][62][63][64][65] Although general provisions of the Alabama Constitution provide that the apportionment of seats in both houses of the Alabama Legislature should be on a population basis, other more detailed provisions clearly make compliance with both sets of requirements impossible. With respect to the operation of the Equal Protection Clause, it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions. In those States where the alleged malapportionment has resulted from noncompliance with state constitutional provisions which, if complied with, would result in an apportionment valid under the Equal Protection Clause, the judicial task of providing effective relief would appear to be rather simple. We agree with the view of the District Court that state constitutional provisions should be deemed violative of the Federal Constitution only when validly asserted constitutional rights could not otherwise be protected and effectuated. Clearly, courts should attempt to accommodate the relief ordered to the apportionment provisions of state constitutions insofar as is possible. But it is also quite clear that a state legislative apportionment scheme is no less violative of the Federal Constitution when it is based on state constitutional provisions which have been consistently complied with than when resulting from a noncompliance with state constitutional requirements. When there is an unavoidable conflict between the Federal and a State Constitution, the Supremacy Clause of course controls.

***585** X.

[66][67][68][69][70] We do not consider here the difficult question of the proper remedial devices which federal courts should utilize in state legislative apportionment cases. [FN66] Remedial techniques in this new and developing area of the law will probably often differ with the circumstances of the challenged apportionment and a variety of local conditions. It is enough to say now that, once a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan. However, ****1394** under certain circumstances, such as where an impending election is imminent and a State's election machinery is already in progress, equitable considerations might justify a court in withholding the granting of immediately effective relief in a legislative apportionment case, even though the existing apportionment scheme was found invalid. In awarding or withholding immediate relief, a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can

reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitate changes that could make unreasonable or embarrassing demands on a State in adjusting to the requirements of the court's decree. As stated by MR. JUSTICE DOUGLAS, concurring in Baker v. Carr, 'any relief accorded can be fashioned in the light of well-known principles of equity.' [FN67]

FN66. Cf. Baker v. Carr, 369 U.S. 186, 198, 82 S.Ct. 691, 699. See also 369 U.S., at 250--251, 82 S.Ct. at 727--728 (Douglas, J., concurring), and passages from Baker quoted in this opinion, supra, at 1379, and infra.

FN67. 369 U.S., at 250, 82 S.Ct., at 727.

***586** [71][72][73] We feel that the District Court in this case acted in a most proper and commendable manner. It initially acted wisely in declining to stay the impending primary election in Alabama, and properly refrained from acting further until the Alabama Legislature had been given an opportunity to remedy the admitted discrepancies in the State's legislative apportionment scheme, while initially stating some of its views to provide guidelines for legislative action. And it correctly recognized that legislative reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. Additionally, the court below acted with proper judicial restraint, after the Alabama Legislature had failed to act effectively in remedying the constitutional deficiencies in the State's legislative apportionment scheme, in ordering its own temporary reapportionment plan into effect, at a time sufficiently early to permit the holding of elections pursuant to that plan without great difficulty, and in prescribing a plan admittedly provisional in purpose so as not to usurp the primary responsibility for reapportionment which rests with the legislature.

[74][75] We find, therefore, that the action taken by the District Court in this case, in ordering into effect a reapportionment of both houses of the Alabama Legislature for purposes of the 1962 primary and general elections, by using the best parts of the two proposed plans which it had found, as a whole, to be invalid, [FN68] was an appropriate and ***587** well-considered exercise of judicial power. Admittedly, the lower court's ordered plan was intended only as a temporary and provisional measure and the District Court correctly indicated that the plan was invalid as a permanent apportionment. In retaining jurisdiction while deferring a hearing on the issuance of a final injunction in order to give the provisionally reapportioned legislature an opportunity to act effectively, the court below proceeded in a proper fashion. Since the District Court evinced its realization that its ordered reapportionment could not be sustained as the basis for conducting the 1966 election of Alabama legislators, and avowedly intends to take some further action should the reapportioned Alabama Legislature fail to enact a constitutionally valid, permanent apportionment scheme in the interim, we affirm the judgment below and remand ****1395** the cases for further proceedings consistent with the views stated in this opinion. It is so ordered.

FN68. Although the District Court indicated that the apportionment of the Alabama House under the 67-Senator Amendment was valid and acceptable, we of course reject that determination, which we regard as merely precatory and advisory since the court below found the overall plan, under the proposed constitutional amendment, to be unconstitutional. See 208 F.Supp., at 440--441. See the discussion earlier in this opinion, supra, at 1385.

Affirmed and remanded.

Mr. Justice CLARK, concurring in the affirmance.

The Court goes much beyond the necessities of this case in laying down a new 'equal population' principle for state legislative apportionment. This principle seems to be an offshoot of Gray v. Sanders, 372 U.S. 368, 381 (1963), i.e., 'one person, one vote,' modified by the 'nearly as is practicable' admonition of Wesberry v. Sanders, 376 U.S. 1, 8, 84 S.Ct. 526, 530, 11 L.Ed.2d 481 (1964). [FN*] Whether 'nearly as is ***588**

practicable' means 'one person, one vote' qualified by 'approximately equal' or 'some deviations' or by the impossibility of 'mathematical nicety' is not clear from the majority's use of these vague and meaningless phrases. But whatever the standard, the Court applies it to each house of the State Legislature.

FN* Incidentally, neither of these cases, upon which the Court bases its opinion, is apposite. Gray involved the use of Georgia's county unit rule in the election of United States Senators and Wesberry was a congressional apportionment case.

It seems to me that all that the Court need say in this case is that each plan considered by the trial court is 'a crazy quilt,' clearly revealing invidious discrimination in each house of the Legislature and therefore violative of the Equal Protection Clause. See my concurring opinion in Baker v. Carr, 369 U.S. 186, 253--258, 82 S.Ct. 691, 629--732, 7 L.Ed.2d 663 (1962).

I, therefore, do not reach the question of the so-called 'federal analogy.' But in my view, if one house of the State Legislature meets the population standard, representation in the other house might include some departure from it so as to take into account, on a rational basis, other factors in order to afford some representation to the various elements of the State. See my dissenting opinion in Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 741, 84 S.Ct. 1476, decided this date.

Mr. Justice STEWART in Nos. 23, 27, 41.

All of the parties have agreed with the District Court's finding that legislative inaction for some 60 years in the face of growth and shifts in population has converted Alabama's legislative apportionment plan enacted in 1901 into one completely lacking in rationality. Accordingly, for the reasons stated in my dissenting opinion in Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S., p. 744, 84 S.Ct., p. 1477. I would affirm the judgment of the District Court holding that this apportionment violated the Equal Protection Clause.

I also agree with the Court that it was proper for the District Court, in framing a remedy, to adhere as closely ***589** as practicable to the apportionments approved by the representatives of the people of Alabama, and to afford the State of Alabama full opportunity, consistent with the requirements of the Federal Constitution, to devise its own system of legislative apportionment.

Mr. Justice HARLAN, dissenting. [FN**]

FN** (This opinion applies also to No. 20, WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S.Ct. 1418; No. 29, Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656, 84 S.Ct. 1429; No. 69, Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441; No. 307, Roman v. Sincock, 377 U.S. 695, 84 S.Ct. 1449; and No. 508, Lucas v. Forty-Fourth General Assembly of State of Colorado, 377 U.S. 713, 84 S.Ct. 1459.)

In these cases the Court holds that seats in the legislatures of six States [FN1] are apportioned in ways that violate the Federal Constitution. Under the Court's ruling it is bound to follow that the legislatures in all but a few of the ****1396** other 44 States will meet the same fate. [FN2] These decisions, with Wesberry v. Sanders, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481, involving congressional districting by the States, and Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821, relating to elections for statewide office, have the effect of placing basic aspects of state political systems under the pervasive overlordship of the federal judiciary. Once again, [FN3] I must register my protest.

FN1. Alabama, Colorado, Delaware, Maryland, New York, Virginia.

FN2. In the Virginia case, Davis v. Mann, 377 U.S. 678, 84 S.Ct. 1441, the defendants introduced an exhibit prepared by the staff of the Bureau of Public Administration of the University of Virginia in which the Virginia Legislature, now held to be unconstitutionally apportioned, was ranked eighth among the 50 States in 'representativeness,' with population taken as the basis of representation. The Court notes that

before the end of 1962, litigation attacking the apportionment of state legislatures had been instituted in at least 34 States. Ante, p. 1378, note 30. See infra, pp. 1406--1407.

FN3. See Baker v. Carr, 369 U.S. 186, 330, 82 S.Ct. 691, 771, 7 L.Ed.2d 663, and the dissenting opinion of Frankfurter, J., in which I joined, id., 369 U.S. at 266, 82 S.Ct. at 737; Gray v. Sanders, 372 U.S. 368, 382, 83 S.Ct. 801, 809; Wesberry v. Sanders, 376 U.S. 1, 20, 84 S.Ct. 526, 536.

***590** PRELIMINARY STATEMENT.

Today's holding is that the Equal Protection Clause of the Fourteenth Amendment requires every State to structure its legislature so that all the members of each house represent substantially the same number of people; other factors may be given play only to the extent that they do not significantly encroach on this basic 'population' principle. Whatever may be thought of this holding as a piece of political ideology--and even on that score the political history and practices of this country from its earliest beginnings leave wide room for debate (see the dissenting opinion of Frankfurter, J., in Baker v. Carr, 369 U.S. 186, 266, 301--323, 82 S.Ct. 691, 737, 755--767, 7 L.Ed.2d 663)--I think it demonstrable that the Fourteenth Amendment does not impose this political tenet on the States or authorize this Court to do so.

The Court's constitutional discussion, found in its opinion in the Alabama cases (Nos. 23, 27, 41, ante, p. 1362) and more particularly at pages 1381--1385 thereof, is remarkable (as, indeed, is that found in the separate opinions of my Brothers STEWART and CLARK, ante, p. 1395,) for its failure to address itself at all to the Fourteenth Amendment as a whole or to the legislative history of the Amendment pertinent to the matter at hand. Stripped of aphorisms, the Court's argument boils down to the assertion that appellees' right to vote has been invidiously 'debased' or 'diluted' by systems of apportionment which entitle them to vote for fewer legislators than other voters, an assertion which is tied to the Equal Protection Clause only by the constitutionally frail tautology that 'equal' means 'equal.'

Had the Court paused to probe more deeply into the matter, it would have found that the Equal Protection Clause was never intended to inhibit the States in choosing ***591** any democratic method they pleased for the apportionment of their legislatures. This is shown by the language of the Fourteenth Amendment taken as a whole, by the understanding of those who proposed and ratified it, and by the political practices of the States at the time the Amendment was adopted. It is confirmed by numerous state and congressional actions since the adoption of the Fourteenth Amendment, and by the common understanding of the Amendment as evidenced by subsequent constitutional amendments and decisions of this Court before Baker v. Carr, supra, made an abrupt break with the past in 1962.

****1397** The failure of the Court to consider any of these matters cannot be excused or explained by any concept of 'developing' constitutionalism. It is meaningless to speak of constitutional 'development' when both the language and history of the controlling provisions of the Constitution are wholly ignored. Since it can, I think, be shown beyond doubt that state legislative apportionments, as such, are wholly free of constitutional limitations, save such as may be imposed by the Republican Form of Government Clause (Const., Art. IV, s 4), [FN4] the Court's action now bringing them within the purview of the Fourteenth Amendment amounts to nothing less than an exercise of the amending power by this Court.

FN4. That clause, which manifestly has no bearing on the claims made in these cases, see V Elliot's Debates on the Adoption of the Federal Constitution (1845), 332-333, could not in any event be the foundation for judicial relief. Luther v. Borden, 7 How. 1, 42--44, 12 L.Ed. 581; Ohio ex rel. Bryant v. Akron Metropolitan Park District, 281 U.S. 74, 79--80, 50 S.Ct. 228, 230, 74 L.Ed. 710; Highland Farms Dairy, Inc., v. Agnew, 300 U.S. 608, 612, 57 S.Ct. 549, 551, 81 L.Ed. 835. In Baker v. Carr, supra, 369 U.S. at 227, 82 S.Ct. at 715, the Court stated that reliance on the Republican Form of Government Clause 'would be futile.'

So far as the Federal Constitution is concerned, the complaints in these cases should all have been

dismissed below for failure to state a cause of action, because what ***592** has been alleged or proved shows no violation of any constitutional right.

Before proceeding to my argument it should be observed that nothing done in Baker v. Carr, supra, or in the two cases that followed in its wake, Gray v. Sanders and Wesberry v. Sanders, supra, from which the Court quotes at some length, forecloses the conclusion which I reach.

Baker decided only that claims such as those made here are within the competence of the federal courts to adjudicate. Although the Court stated as its conclusion that the allegations of a denial of equal protection presented 'a justiciable constitutional cause of action', 369 U.S., at 237, 82 S.Ct. at 720, it is evident from the Court's opinion that it was concerned all but exclusively with justiciability and gave no serious attention to the question whether the Equal Protection Clause touches state legislative apportionments. [FN5] Neither the opinion of the Court nor any of the concurring opinions considered the relevant text of the Fourteenth Amendment or any of the historical materials bearing on that question. None of the materials was briefed or otherwise brought to the Court's attention. [FN6]

> FN5. It is fair to say that, beyond discussion of a large number of cases having no relevance to this question, the Court's views on this subject were fully stated in the compass of a single sentence: 'Judicial standards under the Equal Protection Clause are well developed and familiar, and it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects no policy, but simply arbitrary and capricious action.' 369 U.S., at 226, 82 S.Ct. at 715.
> Except perhaps for the 'crazy quilt' doctrine of my Brother CLARK, 369 U.S., at 251, 82 S.Ct. at 727, nothing is added to this by any of the concurring opinions, id., 369 U.S. at 241, 265, 82 S.Ct. at 723, 736.
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> FN6. The cryptic remands in Scholle v. Hare, 369 U.S. 429, 82 S.Ct. 910, 8 L.Ed.2d 1, and WMCA, Inc., v. Simon, 370 U.S. 190, 82 S.Ct. 1234, 8 L.Ed.2d 430, on the authority of Baker, had nothing to say on the question now before the Court.

***593** In the Gray case the Court expressly laid aside the applicability to state legislative apportionments of the 'one person, one vote' theory there found to require the striking down of the Georgia county unit system. See 372 U.S., at 376, 83 S.Ct. at 806, and the concurring opinion of STEWART, J., joined by ****1398** CLARK, J., id., 372 U.S. at 381--382, 83 S.Ct. at 809.

In Wesberry, involving congressional districting, the decision rested on Art. I, s 2, of the Constitution. The Court expressly did not reach the arguments put forward concerning the Equal Protection Clause. See 376 U.S., at 8, note 10, 84 S.Ct. at 530.

Thus it seems abundantly clear that the Court is entirely free to deal with the cases presently before it in light of materials now called to its attention for the first time. To these I now turn.

I.

A. The Language of the Fourteenth Amendment.

The Court relies exclusively on that portion of s 1 of the Fourteenth Amendment which provides that no State shall 'deny to any person within its jurisdiction the equal protection of the laws,' and disregards entirely the significance of s 2, which reads:

> 'Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or ***594** other crime, the basis of representation therein shall be reduced in the proportion which the

number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.' (Emphasis added.)

The Amendment is a single text. It was introduced and discussed as such in the Reconstruction Committee, [FN7] which reported it to the Congress. It was discussed as a unit in Congress and proposed as a unit to the States, [FN8] which ratified it as a unit. A proposal to split up the Amendment and submit each section to the States as a separate amendment was rejected by the Senate. [FN9] Whatever one might take to be the application of these cases of the Equal Protection Clause if it stood alone, I am unable to understand the Court's utter disregard of the second section which expressly recognizes the States' power to deny 'or in any way' abridge the right of their inhabitants to vote for 'the members of the (State) Legislature,' and its express provision of a remedy for such denial or abridgment. The comprehensive scope of the second section and its particular reference to the state legislatures preclude the suggestion that the first section was intended to have the result reached by the Court today. If indeed the words of the Fourteenth Amendment speak for themselves, as the majority's disregard of history seems to imply, they speak as clearly as may be against the construction which the majority puts on them. But we are not limited to the language of the Amendment itself.

FN7. See the Journal of the Committee, reprinted in Kendrick, The Journal of the Joint Committee of Fifteen on Reconstruction (1914), 83-- 117.

FN8. See the debates in Congress, Cong.Globe, 39th Cong., 1st Sess., 2459--3149, passim (1866) (hereafter Globe).

FN9. Globe 3040.

***595** B. Proposal and Ratification of the Amendment.

The history of the adoption of the Fourteenth Amendment provides conclusive evidence that neither those who proposed nor those who ratified the Amendment believed that the Equal Protection Clause limited the power of the States to apportion their legislatures as ****1399** they saw fit. Moreover, the history demonstrate that the intention to leave this power undisturbed was deliberate and was widely believed to be essential to the adoption of the Amendment.

(i) Proposal of the amendment in Congress.--A resolution proposing what became the Fourteenth Amendment was reported to both houses of Congress by the Reconstruction Committee of Fifteen on April 30, 1866. [FN10] The first two sections of the proposed amendment read:

FN10. Globe 2265, 2286.

'Sec. 1. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

'Sec. 2. Representatives shall be apportioned among the several States which may be included within this Union, according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But whenever, in any State, the elective franchise shall be denied to any portion of its male citizens not less than twenty-one years of age, or in any way abridged except for participation in rebellion or other crime, the basis of representation in such State shall be reduced in the proportion which the number of such male citizens ***596** shall bear to the whole number of malecitizens not less than twenty-one years of age.' [FN11]

FN11. As reported in the House. Globe 2286. For prior versions of the Amendment in the Reconstruction Committee, see Kendrick, op. cit., supra, note 7, 83--117. The work of the Reconstruction Committee is discussed in Kendrick, supra, and Flack, The Adoption of the Fourteenth Amendment (1908), 55--139, passim.

In the House, Thaddeus Stevens introduced debate on the resolution on May 8. In his opening remarks, Stevens explained why he supported the

resolution although it fell 'far short' of his wishes:

'I believe it is all that can be obtained in the present state of public opinion. Not only Congress but the several States are to be consulted. Upon a careful survey of the whole ground, we did not believe that nineteen of the loyal States could be induced to ratify and proposition more stringent than this.' [FN12]

FN12. Globe 2459.

In explanation of this belief, he asked the House to remember 'that three months since, and more, the committee reported and the House adopted a proposed amendment fixing the basis of representation in such way as would surely have secured the enfranchisement of every citizen at no distant period,' but that proposal had been rejected by the Senate. [FN13]

FN13. Ibid. Stevens was referring to a proposed amendment to the Constitution which provided that 'whenever the elective franchise shall be denied or abridged in any State on account of race or color, all persons therein of such race or color shall be excluded from the basis of representation.' Globe 535. It passed the House, id., at 538, but did not muster the necessary two-thirds vote in the Senate, id., at 1289.

He then explained the impact of the first section of the proposed Amendment, particularly the Equal Protection Clause.

'This amendment * * * allows Congress to correct the unjust legislation of the States, so far that the *597 law which operates upon one man shall operate equally upon all. Whatever law punishes a white man for a crime shall punish the black man precisely in the same way and to the same degree. Whatever law **1400 protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all. Whatever law allows the white man to testify in court shall allow the man of color to do the same. These are great advantages over their present codes. Now different degrees of punishment are inflicted, not on account of the magnitude of the crime, but according to the color of the skin. Now color disqualifies a man from testifying in courts, or being tried in the same way as white men. I need not enumerate these partial and oppressive laws. Unless the Constitution should restrain them those States will all, I fear, keep up this discrimination, and crush to death the hated freedmen.' [FN14]

FN14. Globe 2459.

He turned next to the second section, which he said he considered 'the most important in the article.' [FN15] Its effect, he said, was to fix 'the basis of representation in Congress.' [FN16] In unmistakable terms, he recognized the power of a State to withhold the right to vote:

FN15. Ibid.

FN16. Ibid.

'If any State shall exclude any of her adult male citizens from the elective franchise, or abridge that right, she shall forfeit her right to representation in the same proportion. The effect of this provision will be either to compel the States to grant universal suffrage or so to shear them of their power as to keep them forever in a hopeless minority in the national Government, both legislative and executive.' [FN17]

FN17. Ibid.

*598 Closing his discussion of the second section, he noted his dislike for the fact that it allowed 'the States to discriminate (with respect to the right to vote) among the same class, and receive proportionate credit inrepresentation.' [FN18]

FN18. Globe 2460.

Toward the end of the debate three days later, Mr. Bingham, the author of the first section in the Reconstruction Committee and its leading proponent, [FN19] concluded his discussion of it with the following:

FN19. Kendrick, op. cit., supra, note 7, 87, 106; Flack, op. cit., supra, note 11, 60--68, 71.

'Allow me, Mr. Speaker, in passing, to say that this amendment takes from no State any right that ever pertained to it. No State ever had the right, under the forms of law or otherwise, to deny to any freeman the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. The amendment does not give, as the second section shows, the power to Congress of regulating suffrage in the several States.' [FN20] (Emphasis added.)

FN20. Globe 2542.

He immediately continued:

'The second section excludes the conclusion that by the first section suffrage is subjected to congressional law; save, indeed, with this exception, that as the right in the people of each State to a republican government and to choose their Representatives in Congress is of the guarantees of the Constitution, by this amendment a remedy might be given directly for a case supposed by Madison, where treason might change a State government from a republican to a ***599** despotic government, ****1401** and thereby deny suffrage to the people.' [FN21] (Emphasis added.)

FN21. Ibid. It is evident from the context of the reference to a republican government that Bingham did not regard limitations on the right to vote or the denial of the vote to specified categories of individuals as violating the guarantee of a republican form of government.

He stated at another point in his remarks:

'To be sure we all agree, and the great body of the people of this country agree, and the committee thus far in reporting measures of reconstruction agree, that the exercise of the elective franchise, though it be one of the privileges of a citizen of the Republic, is exclusively under the control of the States.' [FN22] (Emphasis added.)

FN22. Ibid.

In the three days of debate which separate the opening and closing remarks, both made by members of the Reconstruction Committee, every speaker on the resolution, with a single doubtful exception, [FN23] assumed without question that, as Mr. Bingham said, supra, 'the second section excludes the conclusion that by the first section suffrage is subjected to congressional law.' The assumption was neither inadvertent nor silent. Much of the debate concerned the change in the basis of representation effected by the second section, and the speakers stated repeatedly, in express terms or by unmistakable implication, that the States retained the power to regulate suffrage within their borders. Attached as Appendix A hereto are some of those statements. The resolution was adopted by the House without change on May 10. [FN24]

FN23. Representative Rogers, who voted against the resolution, Globe 2545, suggested that the right to vote might be covered by the Privileges and Immunities Clause. Globe 2538. But immediately thereafter he discussed the possibility that the Southern States might 'refuse to allow the negroes to vote.' Ibid.

FN24. Globe 2545.

***600** Debate in the Senate began on May 23, and followed the same pattern. Speaking for the Senate Chairman of the Reconstruction Committee, who was ill, Senator Howard, also a member of the Committee, explained the meaning of the Equal Protection Clause as follows:

'The last two clauses of the first section of the amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State. This abolishes all class legislation in the States and does away with the injustice of subjecting one caste of persons to a code not applicable to another. It prohibits the hanging of a black man for a crime for which the white man is not to be hanged. It protects the black man in his fundamental rights as a citizen with the same shield which it throws over the white man. Is it not time, Mr. President, that we extend to the black man, I had almost called it the poor privilege of the equal protection of the law? * * *

'But, sir, the first section of the proposed amendment does not give to either of these classes the right of voting. The right of suffrage is not, in law, one of the privileges or immunities thus secured by the Constitution. It is merely the creature of law. It has always been regarded in this country as the result of positive local law, not regarded as one of those fundamental rights lying at the basis of all society and without which a people cannot exist except as slaves, subject ****1402** to a depotism (sic).' [FN25] (Emphasis added.)

FN25. Globe 2766.

Discussing the second section, he expressed his regret that it did 'not recognize the authority of the United States over the question of suffrage in the several States ***601** at all * * *.' [FN26] He justified the limited purpose of the Amendment in this regard as follows:

FN26. Ibid.

'But, sir, it is not the question here what will we do; it is not the question what you, or I, or half a dozen other members of the Senate may prefer in respect to colored suffrage; it is not entirely the question what measure we can pass through the two Houses; but the question really is, what will the Legislatures of the various States to whom these amendments are to be submitted do in the premises; what is it likely will meet the general approbation of the people who are to elect the Legislatures, three fourths of whom must ratify our propositions before they have the force of constitutional provisions?
'The committee were of opinion that the States are not yet prepared to sanction so fundamental a change as would be the concession of the right of suffrage to the colored race. We may as well state it plainly and fairly, so that there shall be no misunderstanding on the subject. It was our opinion that three fourths of the States of this Union could not be induced to vote to grant the right of suffrage, even in any degree or under any restriction, to the colored race. * * *
'The second section leaves the right to regulate the elective franchise still with the States, and does not meddle with that right.' [FN27] (Emphasis added.)

FN27. Ibid.

There was not in the Senate, as there had been in the House, a closing speech in explanation of the Amendment. But because the Senate considered, and finally adopted, several changes in the first and second sections, even more attention was given to the problem of voting rights there than had been given in the House. In the ***602** Senate, it was fully understood by everyone that neither the first nor the second section interfered with the right of the States to regulate the elective franchise. Attached as Appendix B hereto are representative statements from the debates to that effect. After having changed the proposed amendment to the form in which it was adopted, the Senate passed the resolution on June 8, 1866. [FN28] As changed, it passed in the House on June 13. [FN29]

FN28. Globe 3042.

FN29. Globe 3149.

(ii) Ratification by the 'loyal' States.--Reports of the debates in the state legislatures on the ratification of the Fourteenth Amendment are not generally available. [FN30] . There is, however, compelling indirect evidence. Of the 23 loyal States which ratified the Amendment before ****1403** 1870, five had constitutional provisions for apportionment of at least one house of their respective legislatures which wholly disregarded the spread of population. [FN31] ***603** Ten more had constitutional provisions which gave primary emphasis to population, but which applied also other principles, such as partial ratios and recognition of political subdivisions, which were intended to favor sparsely settled areas. [FN32] Can it be seriously contended that the legislatures of these States, almost two-thirds of those concerned, would have ratified an amendment which might render their own States' constitutions unconstitutional?

FN30. Such evidence as there is, mostly committee reports and messages to the legislatures from Governors of the States, is to the same effect as the evidence from the debates in the Congress. See Ark.House J. 288 (1866--1867); Fla.Sen.J. 8--10 (1866); Ind.House J. 47--48, 50--51

(1867); Mass.Legis.Doc., House Doc. No. 149, 4--14, 16--17, 23, 24, 25--26 (1867); Mo.Sen.J. 14 (1867); N.J.Sen.J. 7 (Extra Sess.1866); N.C.Sen.J. 96--97, 98--99 (1866--1867); Tenn.House J. 12--15 (1865--1866); Tenn.Sen.J. 8 (Extra Sess. 1866); Va.House J. & Doc., Doc. No. 1, 35 (1866--1867); Wis.Sen.J. 33, 101--103 (1867). Contra: S.C.House J. 34 (1866); Tex.Sen.J. 422 (1866 App.).
For an account of the proceedings in the state legislatures and citations to the proceedings, see Fairman, 'Does the Fourteenth Amendment Incorporate the Bill of Rights?' 2 Stan.L.Rev. 5, 81--126 (1949).

FN31. Conn.Const., 1818, Art. Third, s 3 (towns); N.H.Const., 1792, Part Second, s XXVI (direct taxes paid); N.J.Const., 1844, Art. IV, s II, cl. 1 (counties); R.I.Const., 1842, Art. VI, s 1 (towns and cities); Vt.Const., 1793, c. II, s 7 (towns).
In none of these States was the other House apportioned strictly according to population. Conn.Const., 1818, Amend. II; N.H.Const., 1792, Part Second, ss IX--XI; N.J.Const., 1844, Art. IV, s III, cl. 1; R.I.Const., 1842, Art. V, s 1; Vt.Const., 1793, Amend. 23.

FN32. Iowa Const., 1857, Art. III, s 35; Kan.Const., 1859, Art. 2, s 2, Art. 10, s 1; Me.Const., 1819, Art. IV--Part First, s 3; Mich.Const., 1850, Art. IV, s 3; Mo.Const., 1865, Art. IV, s 2; N.Y.Const., 1846, Art. III, s 5; Ohio Const., 1851, Art. XI, ss 2-- 5; Pa.Const., 1838, Art. I, ss 4, 6, 7, as amended; Tenn.Const., 1834, Art. II, s 5; W.Va.Const., 1861--1863, Art. IV, s 9.

Nor were these state constitutional provisions merely theoretical. In New Jersey, for example, Cape May County, with a population of 8,349, and Ocean County, with a population of 13,628, each elected one State Senator, as did Essex and Hudson Counties, with populations of 143,839 and 129,067, respectively. [FN33] In the House, each county was entitled to one representative, which left 39 seats to be apportioned according to population. [FN34] Since there were 12 counties besides the two already mentioned which had populations over 30,000, [FN35] it is evident that there were serious disproportions in the House also. In ***604** New York, each of the 60 counties except Hamilton County was entitled to one of the 128 seats in the Assembly. [FN36] This left 69 seats to be distributed among counties the populations of which ranged from 15,420 to 942,292. [FN37] With seven more counties having populations over 100,000 and 13 others having populations over 50,000, [FN38] the disproportion in the Assembly was necessarily large. In Vermont, after each county had been allocated one Senator, there were 16 seats remaining to be distributed among the larger counties. [FN39] The smallest county had a population of 4,082; the largest had a population of 40,651 and there were 10 other counties with populations over 20,000. [FN40]

FN33. Ninth Census of the United States, Statistics of Population (1872) (hereafter Census), 49. The population figures, here and hereafter, are for the year 1870, which presumably best reflect the figures for the years 1866--1870. Only the figures for 1860 were available at that time, of course, and they would have been used by anyone interested in population statistics. See, e.g., Globe 3028 (remarks of Senator Johnson).
The method of apportionment is contained in N.J.Const., 1844, Art. IV, s II, cl. 1.

FN34. N.J.Const., 1844, Art. IV, s III, cl. 1. Census 49.

FN35. Ibid.

FN36. N.Y.Const., 1846, Art. III, ss 2, 5. Census 50--51.

FN37. Ibid.

FN38. Ibid.

FN39. There were 14 counties, Census 67, each of which was entitled to at least one out of a total of 30 seats. Vt.Const., 1793, Amend. 23.

FN40. Census 67.

(iii) Ratification by the 'reconstructed' States.--Each of the 10 'reconstructed' States was required to ratify the Fourteenth Amendment before it was ****1404** readmitted to the Union. [FN41] The Constitution of each was scrutinized in Congress. [FN42] Debates over readmission ***605** were extensive. [FN43] In at least one instance, the problem of state legislative apportionment was expressly called to the attention of Congress. Objecting to the inclusion of Florida in the Act of June 25, 1868, Mr. Farnsworth stated on the floor of the House:

> FN41. Act of Mar. 2, 1867, s 5, 14 Stat. 429. See also Act of June 25, 1868, 15 Stat. 73, declaring that the States of North Carolina, South Carolina, Louisiana, Georgia, Alabama, and Florida, would be admitted to representation in Congress when their legislatures had ratified the Fourteenth Amendment. Other conditions were also imposed, including a requirement that Georgia nullify certain provisions of its Constitution. Ibid. Arkansas, which had already ratified the Fourteenth Amendment, was readmitted by Act of June 22, 1868, 15 Stat. 72. Virginia was readmitted by Act of Jan. 26, 1870, 16 Stat. 62; Mississippi by Act of Feb. 23, 1870, 16 Stat. 67; and Texas by Act of Mar. 30, 1870, 16 Stat. 80. Georgia was not finally readmitted until later, by Act of July 15, 1870, 16 Stat. 363.
>
> FN42. Discussing the bill which eventuated in the Act of June 25, 1868, see note 41, supra, Thaddeus Stevens said:
> 'Now, sir, what is the particular question we are considering? Five or six States have had submitted to them the question of forming constitutions for their own government. They have voluntarily formed such constitutions, under the direction of the Government of the United States. * * * They have sent us their constitutions. Those constitutions have been printed and laid before us. We have looked at them; we have pronounced them republican in form; and all we propose to require is that they shall remain so forever. Subject to this requirement, we are willing to admit them into the Union.' Cong.Globe, 40th Cong., 2d Sess., 2465 (1868). See also the remarks of Mr. Butler, infra, p. 1404.
> The close attention given the various Constitutions is attested by the Act of June 25, 1868, which conditioned Georgia's readmission on the deletion of 'the first and third subdivisions of section seventeen of the fifth article of the constitution of said State, except the proviso to the first subdivision * * *.' 15 Stat. 73. The sections involved are printed in Sen.Ex.Doc. No. 57, 40th Cong., 2d Sess., 14--15.
> Compare United States v. States of Louisiana, Texas, Mississippi, Alabama and Florida, 363 U.S. 121, 124--127, 80 S.Ct. 961, 1026, 1027, 1029, 4 L.Ed.2d 1025.
>
> FN43. See, e.g., Cong.Globe, 40th Cong., 2d Sess., 2412--2413, 2858-- 2860, 2861--2871, 2895--2900, 2901--2904, 2927--2935, 2963--2970, 2998-- 3022, 3023--3029 (1868).

'I might refer to the apportionment of representatives. By this constitution representatives in the Legislature of Florida are apportioned in such a manner as to give to the sparsely-populated portions of the State the control of the Legislature. The sparsely-populated parts of the State are those where there are very few negroes, the parts inhabited by the white rebels, the men who, coming in from Georgia, Alabama, and other States, control the fortunes of their several counties. By this constitution every county in that State is entitled to a representative. There are in that State counties that have not thirty registered voters; yet, under this constitution, every one of those counties is entitled ***606** to a representative in the Legislature; while the populous counties are entitled to only one representative each, with an additional representative for every thousand inhabitants.' [FN44]

> FN44. Cong.Globe, 40th Cong., 2d Sess., 3090--3091 (1868).

The response of Mr. Butler is particularly illuminating:

'All these arguments, all these statements, all the provisions of this constitution have been submitted to the Judiciary Committee of the Senate, and they have found the constitution republican and proper. This constitution has been submitted to the Senate, and they have found it republican and proper. It has been submitted to your own Committee on Reconstruction, and they have found ****1405** it republican and proper, and have reported it to this House.' [FN45]

FN45. Id., at 3092.

The Constitutions of six of the 10 States Contained provisions departing substantially from the method of apportionment now held to be required by the Amendment. [FN46] And, as in the North, the departures were as real in fact as in theory. In North Carolina, 90 of the 120 representatives were apportioned among the counties without regard to population, leaving 30 seats to be distributed by numbers. [FN47] Since there were seven counties with populations under 5,000 and 26 counties with populations over 15,000, the disproportions must have been widespread and substantial. [FN48] In South Carolina, Charleston, with a population of 88,863, elected two Senators; each of the other counties, with populations ranging from 10,269 to ***607** 42,486, elected one Senator. [FN49] In Florida, each of the 39 counties was entitled to elect one Representative; no county was entitled to more than four. [FN50] These principles applied to Dade County, with a population of 85, and to Alachua County and Leon County, with populations of 17,328 and 15,236, respectively. [FN51]

FN46. Ala.Const., 1867, Art. VIII, s 1; Fla.Const., 1868, Art. XIV; Ga.Const., 1868, Art. III, s 3, 1; La.Const., 1868, Tit. II, Art. 20; N.C.Const., 1868, Art. II, s 6; S.C.Const., 1868, Art. II, ss 6, 8.

FN47. N.C.Const., 1868, Art. II, s 6. There were 90 counties. Census 52--53.

FN48. Ibid.

FN49. S.C.Const., 1868, Art. II, s 8; Census 60.

FN50. Fla.Const., 1868, Art. XIV.

FN51. Census 18--19.

It is incredible that Congress would have exacted ratification of the Fourteenth Amendment as the price of readmission, would have studied the State Constitutions for compliance with the Amendment, and would then have disregarded violations of it.

The facts recited above show beyond any possible doubt:

'(1) that Congress, with full awareness of and attention to the possibility that the States would not afford full equality in voting rights to all their citizens, nevertheless deliberately chose not to interfere with the States' plenary power in this regard when it proposed the Fourteenth Amendment;

(2) that Congress did not include in the Fourteenth Amendment restrictions on the States' power to control voting rights because it believed that if such restrictions were included, the Amendment would not be adopted; and

(3) that at least a substantial majority, if not all, of the States which ratified the Fourteenth Amendment did not consider that in so doing, they were accepting limitations on their freedom, never before questioned, to regulate voting rights as they chose.

Even if one were to accept the majority's belief that it is proper entirely to disregard the unmistakable implications ***608** of the second section of the Amendment in construing the first section, one is confounded by its disregard of all this history. There is here none of the difficulty which may attend the application of basic principles to situations not contemplated or understood when the principles were framed. The problems which concern the Court now were problems when the Amendment was adopted. By the deliberate choice of those responsible for the Amendment, it left those problems untouched.

C. After 1868.

The years following 1868, far from indicating a developing awareness of the applicability of the Fourteenth Amendment to problems of apportionment, demonstrate precisely the reverse:

**1406 that the States retained and exercised the power independently to apportion their legislatures. In its Constitutions of 1875 and 1901, Alabama carried forward earlier provisions guaranteeing each county at least one representative and fixing an upper limit to the number of seats in the House. [FN52] Florida's Constitution of 1885 continued the guarantee of one representative for each county and reduced the maximum number of representatives per county from four to three. [FN53] Georgia, in 1877, continued to favor the smaller counties. [FN54] Louisiana, in 1879, guaranteed each parish at least one representative in the House. [FN55] In 1890, Mississippi guaranteed each county one representative, established a maximum number of representatives, and provided that specified groups of counties should each have approximately one-third of the seats in the House, whatever *609 the spread of population. [FN56] Missouri's Constitution of 1875 gave each county one representative and otherwise favored less populous areas. [FN57] Montana's original Constitution of 1889 apportioned the State Senate by counties. [FN58] In 1877, New Hampshire amended its Constitution's provisions for apportionment, but continued to favor sparsely settled areas in the House and to apportion seats in the Senate according to direct taxes paid; [FN59] the same was true of New Hampshire's Constitution of 1902. [FN60]

FN52. Ala.Const., 1875, Art. IX, ss 2, 3; Ala.Const., 1901, Art. IX, ss 198, 199.

FN53. Fla.Const., 1885, Art. VII, s 3.

FN54. Ga.Const., 1877, Art. III, s III.

FN55. La.Const., 1879, Art. 16.

FN56. Miss.Const., 1890, Art. 13, s 256.

FN57. Mo.Const., 1875, Art. IV, s 2.

FN58. Mont.Const., 1889, Art. V, s 4, Art. VI, s 4.

FN59. N.H.Const., 1792, Part Second, ss IX--XI, XXVI, as amended.

FN60. N.H.Const., 1902, Part Second, Arts. 9, 10, 25.

In 1894, New York adopted a Constitution the peculiar apportionment provisions of which were obviously intended to prevent representation according to population: no county was allowed to have more than one-third of all the Senators, no two countries which were adjoining or 'separated only by public waters' could have more than one-half of all the Senators, and whenever any county became entitled to more than three Senators, the total number of Senators was increased, thus preserving to the small counties their original number of seats. [FN61] In addition, each county except Hamilton was guaranteed a seat in the Assembly. [FN62] The North Carolina Constitution of 1876 gave each county at least one representative and fixed a maximum number of representatives for the whole House. [FN63] Oklahoma's Constitution at the time of its admission to the Union (1907) favored small counties by the use of partial ratios and a maximum number of seats in the House; in addition, no county was permitted to 'take part' in the election of more than seven *610 representatives. [FN64] Pennsylvania, in 1873, continued to guarantee each county one representative in the House. [FN65] The same was true of South Carolina's Constitution of 1895, which provided also that each county should elect one and only one Senator. [FN66] Utah's original Constitution of 1895 assured each county of one representative in the House. [FN67] Wyoming, when it entered the Union in 1889, guaranteed each county at least one Senator and one representative. [FN68]

FN61. N.Y.Const., 1894, Art. III, s 4.

FN62. N.Y.Const., 1894, Art. III, s 5.

FN63. N.C.Const., 1876, Art. II, s 5.

FN64. Okla.Const., 1907, Art. V, s 10.

FN65. Pa.Const., 1873, Art. II, s 17.

FN66. S.C.Const., 1895, Art. III, ss 4, 6.

FN67. Utah Const., 1895, Art. IX, s 4.

FN68. Wyo.Const., 1889, Art. III, s 3.

****1407** D. Today.

Since the Court now invalidates the legislative apportionments in six States, and has so far upheld the apportionment in none, it is scarcely necessary to comment on the situation in the States today, which is of course, as fully contrary to the Court's decision as is the record of every prior period in this Nation's history. As of 1961, the Constitutions of all but 11 States, roughly 20% of the total, recognized bases of apportionment other than geographic spread of population, and to some extent favored sparsely populated areas by a variety of devices, ranging from straight area representation or guaranteed minimum area representation to complicated schemes of the kind exemplified by the provisions of New York's Constitution of 1894, still in effect until struck down by the Court today in No. 20, 377 U.S., p. 633, 84 S.Ct., p. 1418. [FN69] ***611**Since Tennessee, which was the subject of Baker v. Carr, and Virginia, scrutinized and disapproved today in No. 69, 377 U.S., p. 678, 84 S.Ct., p. 1441, are among the 11 States whose own Constitutions are sound from the standpoint of the Federal Constitution as construed today, it is evident that the actual practice of the States is even more uniformly than their theory opposed to the Court's view of what is constitutionally permissible.

> FN69. A tabular presentation of constitutional provisions for apportionment as of Nov. 1, 1961, appears in The Book of the States 1962-- 1963, 58--62. Using this table, but disregarding some deviations from a pure population base, the Advisory Commission on Intergovernmental Relations states that there are 15 States in which the legislatures are apportioned solely according to population. Apportionment of State Legislatures (1962), 12.

E. Other Factors.

In this summary of what the majority ignores, note should be taken of the Fifteenth and Nineteenth Amendments. The former prohibited the States from denying or abridging the right to vote 'on account of race, color, or previous condition of servitude.' The latter, certified as part of the Constitution in 1920, added sex to the prohibited classifications. In Minor v. Happersett, 21 Wall. 162, 22 L.Ed. 627, this Court considered the claim that the right of women to vote was protected by the Privileges and Immunities Clause of the Fourteenth Amendment. The Court's discussion there of the significance of the Fifteenth Amendment is fully applicable here with respect to the Nineteenth Amendment as well.

> 'And still again, after the adoption of the fourteenth amendment, it was deemed necessary to adopt a fifteenth, as follows: 'The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.' The fourteenth amendment had already provided that no State should make or enforce any law which should abridge the privileges or immunities of citizens of the United States. If suffirage was one of these privileges or immunities, why amend the Constitution to prevent its being denied on account of race, &c.? Nothing is more evident than that the greater must ***612** include the less, and if all were already protected why go through with the form of amending the Constitution to protect a part?' Id., 21 Wall. at 175.

In the present case, we can go still further. If constitutional amendment was the only means by which all men and, later, women, could be guaranteed the right to vote at all, even for federal officers, how can it be that the far less obvious right to a particular kind of apportionment of state legislatures--a right to which is opposed a far more plausible conflicting interest of the State than the interest which opposes the general right to vote--can be conferred by judicial construction ****1408** of the Fourteenth Amendment? [FN70] Yet, unless one takes the highly implausible view that the Fourteenth Amendment controls methods of apportionment but leaves the right to vote itself suprotected, the conclusion is inescapable that the Court has, for purposes of these cases, relegated the Fifteenth and Nineteenth Amendments to the same limbo of constitutional anachronisms to which the second section of the Fourteenth Amendment has been assigned.

> FN70. Compare the Court's statement in Guinn v. United States, 238 U.S. 347, 362, 35 S.Ct. 926, 930, 59 L.Ed. 1340;

> '* * * Beyond doubt the (Fifteenth) Amendment does not take away from the state governments in a general sense the power over suffrage which has belonged to those governments from the beginning, and without the possession of which power the whole fabric upon which the division of state and national authority under the Constitution and the organization of both governments rest would be without support, and both the authority of the nation and the state would fall to the ground. In fact, the very command of the Amendment recognizes the possession of the general power by the state, since the Amendment seeks to regulate its exercise as to the particular subject with which it deals.'

Mention should be made finally of the decisions of this Court which are disregarded or, more accurately, silently overruled today. Minor v. Happersett, supra, in which the Court held that the Fourteenth Amendment did not ***613** confer the right to vote on anyone, has already been noted. Other cases are more directly in point. In Colegrove v. Barrett, 330 U.S. 804, 67 S.Ct. 973, 91 L.Ed. 1262, this Court dismissed 'for want of a substantial federal question' an appeal from the dismissal of a complaint alleging that the Illinois legislative apportionment resulted in 'gross inequality in voting power' and 'gross and arbitrary and atrocious discrimination in voting' which denied the plaintiffs equal protection of the laws. [FN71] In Remmey v. Smith, 102 F.Supp. 708 (D.C.E.D.Pa.), a three-judge District Court dismissed a complaint alleging that the apportionment of the Pennsylvania Legislature deprived the plaintiffs of 'constitutional rights guaranteed to them by the Fourteenth Amendment'. Id., 102 F.Supp. at 709. The District Court stated that it was aware that the plaintiffs' allegations were 'notoriously true' and that '(t)he practical disenfranchisement of qualified electors in certain of the election districts in Philadelphia County is a matter of common knowledge.' Id. 102 F.Supp. at 710. This Court dismissed the appeal 'for the want of a substantial federal question.' 342 U.S. 916, 72 S.Ct. 368, 96 L.Ed. 685.

> FN71. The quoted phrases are taken from the Jurisdictional Statement, pp. 13, 19.

In Kidd v. McCanless, 200 Tenn. 273, 292 S.W.2d 40, the Supreme Court of Tennessee dismissed an action for a declaratory judgment that the Tennessee Apportionment Act of 1901 was unconstitutional. The complaint alleged that 'a minority of approximately 37% of the voting population of the State now elects and controls 20 of the 33 members of the Senate; that a minority of 40% of the voting population of the State now controls 63 of the 99 members of the House of Representatives.' Id., at 276, 292 S.W.2d, at 42. Without dissent, this Court granted the motion to dismiss the appeal. 352 U.S. 920, 77 S.Ct. 223, 1 L.Ed.2d 157. In Radford v. Gary, 145 F.Supp. 541 (D.C.W.D.Okla.), a three-judge District Court was ***614** convened to consider 'the complaint of the plaintiff to the effect that the existing apportionment statutes of the State of Oklahoma violate the plain mandate of the Oklahoma Constitution and operate to deprive him of the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States.' Id., 145 F.Supp. at 542. The plaintiff alleged that he was a resident and voter in the most populous county of the State, which had about 15% of the total population of the State but only ****1409** about 2% of the seats in the State Senate and less than 4% of the seats in the House. The complaint recited the unwillingness or inability of the branches of the state government to provide relief and alleged that there was no state remedy available. The District Court granted a motion to dismiss. This Court affirmed without dissent. 352 U.S. 991, 77 S.Ct. 559.

Each of these recent cases is distinguished on some ground or other in Baker v. Carr. See 369 U.S., at 235--236, 82 S.Ct. at 719--720. Their summary dispositions prevent consideration whether these after-the-fact distinctions are real or imaginary. The fact remains, however, that between 1947 and 1957, four cases raising issues precisely the same as those decided today were presented to the Court. Three were dismissed because the issues presented were thought insubstantial and in the fourth the lower court's dismissal was affirmed. [FN72]

> FN72. In two early cases dealing with party primaries in Texas, the Court indicated that the Equal Protection Clause

did afford some protection of the right to vote. Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984. Before and after these cases, two cases dealing with the qualifications for electors in Oklahoma had gone off on the Fifteenth Amendment, Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926; Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281. The rationale of the Texas cases is almost certainly to be explained by the Court's reluctance to decide that party primaries were a part of the electoral process for purposes of the Fifteenth Amendment. See Newberry v. United States, 256 U.S. 232, 41 S.Ct. 469, 65 L.Ed. 913. Once that question was laid to rest in United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, the Court decided subsequent cases involving Texas party primaries on the basis of the Fifteenth Amendment. Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987; Terry v. Adams, 345 U.S. 461, 73 S.Ct. 809, 97 L.Ed. 1152.
The recent decision in Gomillion v. Lightfoot, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110, that a constitutional claim was stated by allegations that municipal lines had been redrawn with the intention of depriving Negroes of the right to vote in municipal elections was based on the Fifteenth Amendment. Only one Justice, in a concurring opinion, relied on the Equal Protection Clause of the Fourteenth Amendment. Id., 364 U.S. at 349, 81 S.Ct. at 131.

I have tried to make the catalogue complete, yet to keep it within the manageable limits of a judicial opinion. In my judgment, today's decisions are refuted by ***615** the language of the Amendment which they construe and by the inference fairly to be drawn from subsequently enacted Amendments. They are unequivocally refuted by history and by consistent theory and practice from the time of the adoption of the Fourteenth Amendment until today.

II.

The Court's elaboration of its new 'constitutional' doctrine indicates how far--and how unwisely--it has strayed from the appropriate bounds of its authority. The consequence of today's decision is that in all but the handful of States which may already satisfy the new requirements the local District Court or, it may be, the state courts, are given blanket authority and the constitutional duty to supervise apportionment of the State Legislatures. It is difficult to imagine a more intolerable and inappropriate interference by the judiciary with the independent legislatures of the States.

In the Alabama cases (Nos. 23, 27, 41), the District Court held invalid not only existing provisions of the State Constitution--which this Court lightly dismisses with a wave of the Supremacy Clause and the remark ***616** that 'it makes no difference whether a State's apportionment scheme is embodied in its constitution or in statutory provisions,' ante, p. 1393 but also a proposed amendment to the Alabama Constitution which had never been submitted to the voters of Alabama for ratification, and 'standby' legislation ****1410** which was not to become effective unless the amendment was rejected (or declared unconstitutional) and in no event before 1966. Sims v. Frink, D.C., 208 F.Supp. 431. See ante, pp. 1374--1376. Both of these measures had been adopted only nine days before, [FN73] at an Extraordinary Session of the Alabama Legislature, convened pursuant to what was very nearly a directive of the District Court, see Sims v. Frink, D.C., 205 F.Supp. 245, 248. The District Court formulated its own plan for the apportionment of the Alabama Legislature, by picking and choosing among the provisions of the legislative measures. 208 F.Supp., at 441--442. See ante, p. 1376. Beyond that, the court warned the legislature that there would be still further judicial reapportionment unless the legislature, like it or not, undertook the task for itself. 208 F.Supp., at 442. This Court now states that the District Court acted in 'a most proper and commendable manner,' ante, p. 1394, and approves the District Court's avowed intention of taking 'some further action' unless the State Legislature acts by 1966, ante, p. 1395.

FN73. The measures were adopted on July 12, 1962. The District Court handed down its opinion on July 21, 1962.

In the Maryland case (No. 29, 377 U.S. 656, 84 S.Ct. 1429), the State Legislature was called into Special Session and enacted a temporary reapportionment of the House of Delegates, under pressure from the state courts. [FN74] Thereafter, the ***617** Maryland Court of Appeals held that the Maryland Senate was constitutionally apportioned. Maryland Committee for Fair Representation v. Tawes, 229 Md. 406, 184 A.2d 715. This Court now holds that neither branch of the State Legislature meets constitutional requirements. 377 U.S., p. 674, 84 S.Ct., p. 1439. The Court presumes that since 'the Maryland constitutional provisions relating to legislative apportionment (are) hereby held unconstitutional, the Maryland Legislature * * * has the inherent power to enact at least temporary reapportionment legislation pending adoption of state constitutional provisions' which satisfy the Federal Constitution, id., 377 U.S., at 675, 84 S.Ct., at 1440. On this premise, the Court concludes that the Maryland courts need not 'feel obliged to take further affirmative action' now, but that 'under no circumstances should the 1966 election of members of the Maryland Legislature be permitted to be conducted pursuant to the existing or any other unconstitutional plan.' Id., 377 U.S., at 676, 84 S.Ct., at 1440.

FN74. In reversing an initial order of the Circuit Court for Anne Arundel County dismissing the plaintiffs' complaint, the Maryland Court of Appeals directed the lower court to hear evidence on and determine the plaintiffs' constitutional claims, and, if it found provisions of the Maryland Constitution to be invalid, to 'declare that the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its membership for purposes of the November, 1962, election.' Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 438--439, 180 A.2d 656, 670. On remand, the opinion of the Circuit Court included such a declaration. The opinion was filed on May 24, 1962. The Maryland Legislature, in Special Session, adopted the 'emergency' measures now declared unconstitutional seven days later, on May 31, 1962.

In the Virginia case (No. 69, 377 U.S., p. 678, 84 S.Ct., p. 1441), the State Legislature in 1962 complied with the state constitutional requirement of regular reapportionment. [FN75] Two days later, a complaint was filed in the District Court. [FN76] Eight months later, the legislative reapportionment was ***618** declared unconstitutional. declared unconstitutional. Mann v. Davis, D.C., 213 F.Supp. 577. The District Court gave the State ****1411** Legislature two months within which to reapportion itself in special session, under penalty of being reapportioned by the court. [FN77] Only a stay granted by a member of this Court slowed the process; [FN78] it is plain that no stay will be forthcoming in the future. The Virginia Legislature is to be given 'an adequate opportunity to enact a valid plan'; but if it fails 'to act promptly in remedying the constitutional defects in the State's legislative apportionment plan,' the District Court is to 'take further action.' 377 U.S. p. 693, 84 S.Ct. p. 1449.

FN75. The Virginia Constitution, Art. IV, s 43, requires that a reapportionment be made every 10 years.

FN76. The 1962 reapportionment acts were approved on Apr. 7, 1962. The complaint was filed on Apr. 9, 1962.

FN77. The District Court handed down its opinion on Nov. 28, 1962, and gave the Virginia General Assembly until Jan. 31, 1963, 'to enact appropriate reapportionment laws'. 213 F.Supp., at 585--586. The court stated that failing such action or an appeal to this Court, the plaintiffs might apply to it 'for such further orders as may be required.' Id., 213 F.Supp. at 586.

FN78. On Dec. 15, 1962, THE CHIEF JUSTICE granted a stay pending final disposition of the case in this Court.

In Delaware (No. 307, 377 U.S. 695, 84 S.Ct. 1449), the District Court entered an order on July 25, 1962, which stayed proceedings until August 7, 1962, 'in the hope and expectation' that the General

Assembly would take 'some appropriate action' in the intervening 13 days. Sincock v. Terry, 207 F.Supp. 205, 207. By way of prodding, presumably, the court noted that if no legislative action were taken and the court sustained the plaintiffs' claim, 'the present General Assembly and any subsequent General Assembly, the members of which were elected pursuant to Section 2 of Article 2 (the challenged provisions of the Delaware Constitution), might be held not to be a de jure legislature and its legislative acts might be held invalid and unconstitutional.' Id., 207 F.Supp. at 205--206. Five days later, on July 30, 1962, the General Assembly approved a proposed amendment to the State Constitution. On August 7, 1962, the District Court entered an order denying the ***619** defendants' motion to dismiss. The court said that it did not wish to substitute its judgment 'for the collective wisdom of the General Assembly of Delaware', but that 'in the light of all the circumstances', it had to proceed promptly. 210 F.Supp. 395, 396. On October 16, 1962, the court declined to enjoin the conduct of elections in November. 210 F.Supp. 396. The court went on to express its regret that the General Assembly had not adopted the court's suggestion, see 207 F.Supp., at 206--207, that the Delaware Constitution be amended to make apportionment a statutory rather than a constitutional matter, so as to facilitate further changes in apportionment which might be required. 210 F.Supp., at 401. In January 1963, the General Assembly again approved the proposed amendment of the apportionment provisions of the Delaware Constitution, which thereby became effective on January 17, 1963. [FN79] Three months later, on April 17, 1963, the District Court reached 'the reluctant conclusion' that Art. II, s 2, of the Delaware Constitution was unconstitutional, with or without the 1963 amendment. Sincock v. Duffy, D.C., 215 F.Supp. 169, 189. Observing that '(t)he State of Delaware, the General Assembly, and this court all seem to be trapped in a kind of box of time,' id., 215 F.Supp. at 191, the court gave that General Assembly until October 1, 1963, to adopt acceptable provisions for apportionment. On May 20, 1963, the District Court enjoined the defendants from conducting any elections, including the general election scheduled for November 1964, pursuant to the old or the new constitutional provisions. [FN80] This Court now ****1412** approves all these ***620** proceedings, noting particularly that in allowing the 1962 elections to go forward, 'the District Court acted in a wise and temperate manner.' 377 U.S., p. 710, 84 S.Ct., p. 1458. [FN81]

FN79. The Delaware Constitution, Art. XVI, s 1, requires that amendments be approved by the necessary two-thirds vote in two successive General Assemblies.

FN80. The District Court thus nailed the lid on the 'box of time' in which everyone seemed to it 'to be trapped.' The lid was temporarily opened a crack on June 27, 1963, when MR. JUSTICE BRENNAN granted a stay of the injunction until disposition of the case by this Court. Since the Court states that 'the delay inherent in following the state constitutional prescription for approval of constitutional amendments by two successive General Assemblies cannot be allowed to result in an impermissible deprivation of appellees' right to an adequate voice in the election of legislators to represent them,' 377 U.S., p. 711, 84 S.Ct., p. 1458, the lid has presumably been slammed shut again.

FN81. In New York and Colorado, this pattern of conduct has thus far been avoided. In the New York case (No. 20, 377 U.S., p. 633, 84 S.Ct., p. 1418), the District Court twice dismissed the complaint, once without reaching the merits, WMCA, Inc., v. Simon, 202 F.Supp. 741, and once, after this Court's remand following Baker v. Carr, supra, 370 U.S. 190, 82 S.Ct. 1234, 8 L.Ed.2d 430, on the merits, 208 F.Supp. 368. In the Colorado case (No. 508, 377 U.S., p. 713, 84 S.Ct., p. 1459), the District Court first declined to interfere with a forthcoming election at which reapportionment measures were to be submitted to the voters, Lisco v. McNichols, D.C., 208 F.Supp. 471, and after the election, upheld the apportionment provisions which had been adopted, D.C., 219 F.Supp. 922.
In view of the action which this Court now takes in both of these cases, there is little

> doubt that the legislatures of these two States will now be subjected to the same kind of pressures from the federal judiciary as have the other States.

Records such as these in the cases decided today are sure to be duplicated in most of the other States if they have not been already. They present a jarring picture of courts threatening to take action in an area which they have no business entering, inevitably on the basis of political judgments which they are incompetent to make. They show legislatures of the States meeting in haste and deliberating and deciding in haste to avoid the threat of judicial interference. So far as I can tell, the Court's only response to this unseemingly state of affairs is ponderous insistence that 'a denial of constitutionally protected rights demands judicial protection,' ante, p. 1384. By thus refusing to recognize the bearing which a potential for ***621** conflict of this kind may have on the question whether the claimed rights are in fact constitutionally entitled to judicial protection, the Court assumes, rather than supports, its conclusion.

It should by now be obvious that these cases do not mark the end of reapportionment problems in the courts. Predictions once made that the courts would never have to face the problem of actually working out an apportionment have proved false. This Court, however, continues to avoid the consequences of its decisions, simply assuring us that the lower courts 'can and * * * will work out more concrete and specific standards,' ante, p. 1390. Deeming it 'expedient' not to spell out 'precise constitutional tests,' the Court contents itself with stating 'only a few rather general considerations.' Ibid.

Generalities cannot obscure the cold truth that cases of this type are not amenable to the development of judicial standards. No set of standards can guide a court which has to decide how many legislative districts a State shall have, or what the shape of the districts shall be, or where to draw a particular district line. No judicially manageable standard can determine whether a State should have single-member districts or multimember districts or some combination of both. No such standard can control the balance between keeping up with population shifts and having stable districts. In all these respects, the courts will be called upon to make particular decisions with respect to which a principle of equally populated districts will be of no assistance whatsoever. Quite obviously, there are limitless possibilities for ****1413** districking consistent with such a principle. Nor can these problems be avoided by judicial reliance on legislative judgments so far as possible. Reshaping or combining one or two districts, or modifying just a few district lines, is no less a matter of choosing among many possible ***622** solutions, with varying political consequences, than reapportionment broadside. [FN82]

> FN82. It is not mere fancy to suppose that in order to avoid problems of this sort, the Court may one day be tempted to hold that all state legislators must be elected in statewide elections.

The Court ignores all this, saying only that 'what is marginally permissible in one State may be unsatisfactory in another, depending on the particular circumstances of the case,' ante, p. 1390. It is well to remember that the product of today's decisions will not be readjustment of a few districts in a few States which most glaringly depart from the principle of equally populated districts. It will be a redetermination, extensive in many cases, of legislative districts in all but a few States.

Although the Court--necessarily, as I believe--provides only generalities in elaboration of its main thesis, its opinion nevertheless fully demonstrates how far removed these problems are from fields of judicial competence. Recognizing that 'indiscriminate districting' is an invitation to 'partisan gerrymandering,' ante, p. 1390, the Court nevertheless excludes virtually every basis for the formation of electoral districts other than 'indiscriminate districting.' In one or another of today's opinions, the Court declares it unconstitutional for a State to give effective consideration to any of the following in establishing legislative districts:

(1) history; [FN83]

> FN83. Ante, p. 1390.

(2) 'economic or other sorts of group interests'; [FN84]

FN84. Ante, p. 1391.

(3) area; [FN85]

FN85. Ante, p. 1391.

(4) geographical considerations; [FN86]

FN86. Ibid.

(5) a desire 'to insure effective representation for sparsely settled areas'; [FN87]

FN87. Ibid.

***623** (6) 'availability of access of citizens to their representatives'; [FN88]

FN88. Ibid.

(7) theories of bicameralism (except those approved by the Court); [FN89]

FN89. Ante, p. 1389.

(8) occupation; [FN90]

FN90. Davis v. Mann, 377 U.S., p. 691, 84 S.Ct., p. 1448.

(9) 'an attempt to balance urban and rural power.' [FN91]

FN91. Id., 377 U.S., p. 692, 84 S.Ct., p. 1448.

(10) the preference of a majority of voters in the State. [FN92]

FN92. Lucas v. Forty-Fourth General Assembly, 377 U.S., p. 736, 84 S.Ct., p. 1473.

So far as presently appears, the only factor which a State may consider, apart from numbers, is political subdivisions. But even 'a clearly rational state policy' recognizing this factor is unconstitutional if 'population is submerged as the controlling consideration * * *.' [FN93]

FN93. Ante, p. 1392.

I know of no principle of logic or practical or theoretical politics, still less any constitutional principle, which establishes all or any of these exclusions. Certain it is that the Court's opinion does not establish them. So far as the Court says anything at all on this score, it says only that 'legislators represent people, not trees or acres,' ante, p. 1382; that 'citizens, ****1414** not history or economic interests, cast votes,' ante, p. 1391; that 'people, not land or trees or pastures, vote,' ibid. [FN94] All this may be conceded. But it is surely equally obvious, and, in the context of elections, more meaningful to note that people are not ciphers and that legislators can represent their electors only by speaking ***624** for their interests--economic, social, political--many of which do reflect the place where the electors live. The Court does not establish, or indeed even attempt to make a case for the proposition that conflicting interests within a State can only be adjusted by disregarding them when voters are grouped for purposes of representation.

FN94. The Court does note that, in view of modern development in transportation and communication, it finds 'unconvincing' arguments based on a desire to insure representation of sparsely settled areas or to avoid districts so large that voters' access to their representatives is impaired. Ante, p. 1391.

CONCLUSION

With these cases the Court approaches the end of the third round set in motion by the complaint filed in Baker v. Carr. What is done today deepens my conviction that judicial entry into this realm is profoundly ill-advised and constitutionally impermissible. As I have said before, Wesberry v. Sanders, supra, 376 U.S. at 48, 84 S.Ct. at 547, I believe that the vitality of our political system, on which in the last analysis all else depends, is weakened by reliance on the judiciary for political reform; in time a complacent body politic may result.

These decisions also cut deeply into the fabric of our federalism. What must follow from them may eventually appear to be the product of state legislatures. Nevertheless, no thinking person can

fail to recognize that the aftermath of these cases, however desirable it may be thought in itself, will have been achieved at the cost of a radical alteration in the relationship between the States and the Federal Government, more particularly the Federal Judiciary. Only one who has an overbearing impatience with the federal system and its political processes will believe that that cost was not too high or was inevitable.

Finally, these decisions give support to a current mistaken view of the Constitution and the constitutional function of this Court. This view, in a nutshell, is that every major social ill in this country can find its cure in some constitutional 'principle,' and that this Court should 'take the lead' in promoting reform when other branches of government fail to act. The Constitution is ***625** not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, the though of as a general haven for reform movements. The Constitution is an instrument of government, fundamental to which is the premise that in a diffusion of governmental authority lies the greatest promise that this Nation will realize liberty for all its citizens. This Court, limited in function in accordance with that premise, does not serve its high purpose when it exceeds its authority, even to satisfy justified impatience with the slow workings of the political process. For when, in the name of constitutional interpretation, the Court adds something to the Constitution that was deliberately excluded from it, the Court in reality substitutes its view of what should be so for the amending process.

I dissent in each of these cases, believing that in none of them have the plaintiffs stated a cause of action. To the extent that Baker v. Carr, expressly or by implication, went beyond a discussion of jurisdictional doctrines independent of the substantive issues involved here, it should be limited to what it in fact was: an experiment in venturesome constitutionalism. I would reverse the judgments of the District Courts in Nos. 23, 27, and 41 (Alabama), No. 69 (Virginia), and ****1415** No. 307 (Delaware), and remand with directions to dismiss the complaints. I would affirm the judgments of the District Courts in No. 20 (New York), and No. 508 (Colorado), and of the Court of Appeals of Maryland in No. 29.

APPENDIX A TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

Statements made in the House of Representatives during the debate on the resolution proposing the Fourteenth Amendment. [FN*]

FN* All page references are to Cong.Globe, 39th Cong., 1st Sess. (1866).

***626** 'As the nearest approach to justice which we are likely to be able to make, I approve of the second section that bases representation upon voters.' 2463 (Mr. Garfield).

'Would it not be a most unprecedented thing that when this (former slave) population are not permitted where they reside to enter into the basis of representation in their own State, we should receive it as an element of representation here; that when they will not count them in apportioning their own legislative districts, we are to count them as five fifths (no longer as three fifths, for that is out of the question) as soon as you make a new apportionment?' 2464--2465 (Mr. Thayer).

'The second section of the amendment is ostensibly intended to remedy a supposed inequality in the basis of representation. The real object is to reduce the number of southern representatives in Congress and in the Electoral College; and also to operate as a standing inducement to negro suffrage.' 2467 (Mr. Boyer).

'Shall the pardoned rebels of the South include in the basis of representation four million people to whom they deny political rights, and to no one of whom is allowed a vote in the selection of a Representative?' 2468 (Mr. Kelley).

'I shall, Mr. Speaker, vote for this amendment; not because I approve it. Could I have controlled the report of the committee of fifteen, it would have proposed to give the right of suffrage to every loyal man in the country.' 2469 (Mr. Kelley).

'But I will ask, why should not the representation of the States be limited as the States themselves limit suffrage? * * * If the negroes of the South are ***627** not to be counted as a political element in the government of the South in the States, why should they be counted as a political element in the government of the country in the Union?' 2498 (Mr. Broomall).

'It is now proposed to base representation upon suffrage, upon the number of voters, instead of upon the aggregate population in every State of the Union.' 2502 (Mr. Raymond).

'We admit equality of representation based upon the exercise of the elective franchise by the people. The proposition in the matter of suffrage falls short of what I desire, but so far as it goes it tends to the equalization of the inequality at present existing; and while I demand and shall continue to demand the franchise for all loyal male citizens of this country--and I cannot but admit the possibility that ultimately those eleven States may be restored to representative power without the right of franchise being conferred upon the colored people--I should feel myself doubly humiliated and disgraced, and criminal even, if I hesitated to do what I can for a proposition which equalizes representation.' 2508 (Mr. Boutwell).

'Now, conceding to each State the right to regulate the right of suffrage, they ought not to have a representation ****1416** for male citizens not less than twenty-one years of age, whether white or black, who are deprived of the exercise of suffrage. This amendment will settle the complication in regard to suffrage and representation, leaving each State to regulate that for itself, so that it will be for it to decide whether or not it shall have a representation for all its male citizens not less than twenty-one years of age.' 2510 (Mr. Miller).

***628** 'Manifestly no State should have its basis of national representation enlarged by reason of a portion of citizens within its borders to which the elective franchise is denied. If political power shall be lost because of such denial, not imposed because of participation in rebellion or other crime, it is to be hoped that political interests may work in the line of justice, and that the end will be the impartial enfranchisement of all citizens not disqualified by crime. Whether that end shall be attained or not, this will be secured: that the measure of political power of any State shall be determined by that portion of its citizens which can speak and act at the polls, and shall not be enlarged because of the residence within the State of portions of its citizens denied the right of franchise. So much for the second section of the amendment. It is not all that I wish and would demand; but odious inequalities are removed by it and representation will be equalized, and the political rights of all citizens will under its operation be, as we believe, unlitimately recognized and admitted.' 2511 (Mr. Eliot).

'I have no doubt that the Government of the United States has full power to extend the elective franchise to the colored population of the insurgent States. I mean authority; I said power. I have no doubt that the Government of the United States has authority to do this under the Constitution; but I do not think they have the power. The distinction I make between authority and power is this: we have, in the nature of our Government, the right to do it; but the public opinion of the country is such at this precise moment as to make it impossible we should do it. It was therefore most wise on the part of the committee on reconstruction to waive this matter in deference to public opinion. The situation ***629** of opinion in these States compels us to look to other means to protect the Government against the enemy.' 2532 (Mr. Banks).

'If you deny to any portion of the loyal citizens of your State the right to vote for Representatives you shall not assume to represent them, and, as you have done for so long a time, misrepresent and oppress them. This is a step in the right direction; and although I should prefer to see incorporated into the Constitution a guarantee of universal suffrage, as we cannot get the required two thirds for that, I cordially support this proposition as the next best.' 2539--2540 (Mr. Farnsworth).

APPENDIX B TO OPINION OF MR. JUSTICE HARLAN, DISSENTING.

Statements made in the Senate during the debate on the resolution proposing the Fourteenth Amendment. [FN*]

FN* All page references are to Cong.Globe, 39th Cong., 1st Sess. (1866).

'The second section of the constitutional amendment proposed by the committee can be justified upon no other theory than that the negroes ought to vote; and negro suffrage must be vindicated before the people in sustaining that section, for it does not exclude the non-voting population of the North, because it is admitted

that there is no wrong in excluding **1417 from suffrage aliens, females, and minors. But we say, if the negro is excluded from suffrage he shall also be excluded from the basis of representation.

Why this inequality? Why this injustice? For injustice it would be unless there be some good reason for this discrimination against the South in excluding her non-voting population from the basis *630 of representation. The only defense that we can make to this apparent injustice is that the South commits an outrage upon human rights when she denies the ballot to the blacks, and we will not allow her to take advantage of her own wrong or profit by this outrage. Does any one suppose it possible to avoid this plain issue before the people? For if they will sustain you in reducing the representation of the South because she does not allow the negro to vote, they will do so because they think it is wrong to disfranchise him.' 2800 (Senator Stewart).

'It (the second section of the proposed amendment) relieves him (the Negro) from misrepresentation in Congress by denying him any representation whatever.' 2801 (Senator Stewart).

'But I will again venture the opinion that it (the second section) means as if it read thus: no State shall be allowed a representation on a colored population unless the right of voting is given to the negroes--presenting to the States the alternative of loss of representation or the enfranchisement of the negroes, and their political equality.' 2939 (Senator Hendricks).

'I should be much better satisfied if the right of suffrage had been given at once to the more intelligent of them (the Negroes) and such as had served in our Army. But it is believed by wiser ones than myself that this amendment will very soon produce some grant of suffrage to them, and that the craving for political power will ere long give them universal suffrage. * * * Believing that this amendment probably goes as far in favor of suffrage to the negro as is practicable to accomplish now, and hoping it may in *631 the end accomplish all I desire in this respect, I shall vote for its adoption, although I should be glad to go further.' 2963--2964 (Senator Poland). 'What is to be the operation of this amendment? Just this: your whip is held over Pennsylvania, and you say to her that she must either allow her negroes to vote or have one member of Congress less.' 2987 (Senator Cowan).

'Now, sir, in all the States--certainly in mine, and no doubt in all--there are local as contradistinguished from State elections. There are city elections, county elections, and district or borough elections; and those city and county and district elections are held under some law of the State in which the city or county or district or borough may be; and in those elections, according to the laws of the States, certain qualifications are prescribed, residence within the limits of the locality and a property qualification in some. Now, is it proposed to say that if every man in a State is not at liberty to vote at a city or a country or a borough election that is to affect the basis of representation?' 2991 (Senator Johnson).

'Again, Mr. President, the measure upon the table, like the first proposition submitted to the Senate from the committee of fifteen, concedes to the States * * * not only the right, but the exclusive right, to regulate the franchise. * * * It says that each of the southern States, and, of course, each other State in the Union, has a right to regulate for itself the franchise, and **1418 that consequently, as far as the Government of the United States is concerned, if the black man is not permitted the right to the franchise, it will be a wrong (if a wrong) which the Government *632 of the United States will be impotent to redress.' 3027 (Senator Johnson).

'The amendment fixes representation upon numbers, precisely as the Constitution new does, but when a State denies or abridges the elective franchise to any of its male inhabitants who are citizens of the United States and not less than twenty-one years of age, except for participation in rebellion or other crime, then such State will lose its representation in Congress in the proportion which the male citizen so excluded bears to the whole number of male citizens not less than twenty-one years of age in the State.' 3033 (Senator Henderson).

377 U.S. 533, 84 S.Ct. 1362, 12 L.Ed.2d 506

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2004 WL 2384445
--- F.3d ----, 2004 WL 2384445 (6th Cir.(Ohio))
(Cite as: 2004 WL 2384445 (6th Cir.(Ohio)))

H
Briefs and Other Related Documents

United States Court of Appeals,
Sixth Circuit.

SANDUSKY COUNTY DEMOCRATIC PARTY; The Ohio Democratic Party; Farm Labor Organizing Committee; North Central Ohio Building and Construction Trades Council; and Local 245 International Brotherhood of Electrical Workers,
Plaintiffs-Appellees,
v.
J. Kenneth BLACKWELL, Defendant-Appellant (04-4265),
Gregory L. Arnold; Glenn A. Wolfe; and Thomas W. Noe, Intervenors-Appellants (04-4266).

No. 04-4265, 04-4266.

Submitted: Oct. 23, 2004.
Decided and Filed: Oct. 26, 2004.

Background: Political parties and labor unions brought action against Ohio's Secretary of State, alleging that Secretary's directive governing issuance of provisional ballots in Ohio elections violated the Help America Vote Act (HAVA). The United States District Court for the Northern District of Ohio, James G. Carr, J., issued preliminary injunction, and Secretary appealed.

Holdings: The Court of Appeals held that:
(1) HAVA created a federal right enforceable against state officials under § 1983 with respect to the right to cast a provisional ballot under the circumstances described in HAVA;
(2) plaintiffs had standing to assert the rights of their individual members who would vote in upcoming election;
(3) directive requiring a voter's residence in a precinct to be determined on the spot by a poll worker, and empowering poll workers to deny a voter a provisional ballot if the voter's residence in the correct precinct could not be confirmed, violated HAVA;
(4) HAVA permitted Ohio voters to cast provisional ballots only in their precincts of residence; and
(5) HAVA did not require provisional ballots cast in the wrong precinct to be counted as valid ballots.
Affirmed in part, reversed in part, and remanded.

[1] Elections ⚿223
144k223 Most Cited Cases
Help America Vote Act's (HAVA) provisional voting section is designed to recognize, and compensate for, the improbability of "perfect knowledge" on the part of local election officials. Help America Vote Act of 2002, § 302, 42 U.S.C.A. § 15482.
[2] Elections ⚿223
144k223 Most Cited Cases
Because any given election worker may not in fact have perfect knowledge, the person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is entitled under Help America Vote Act (HAVA) to cast a provisional ballot. Help America Vote Act of 2002, § 302, 42 U.S.C.A. § 15482.
[3] Civil Rights ⚿1029
78k1029 Most Cited Cases
Help America Vote Act (HAVA) created a federal right enforceable against state officials under § 1983 with respect to the right to cast a provisional ballot under the circumstances described in HAVA. Help America Vote Act of 2002, § 302(a)(2), 42 U.S.C.A. § 15482(a)(2); 42 U.S.C.A. § 1983.
[4] Civil Rights ⚿1027
78k1027 Most Cited Cases
Only unambiguously conferred rights will support a § 1983 action. 42 U.S.C.A. §1983.
[5] Civil Rights ⚿1027
78k1027 Most Cited Cases
Section 1983 provides a remedy only for the deprivation of rights, privileges, or immunities secured by the Constitution and laws of the United States, and, therefore, it is rights, not the broader or

vaguer benefits or interests, that may be enforced under the authority of that section. 42 U.S.C.A. § 1983.

[6] Civil Rights ⚿1027
78k1027 Most Cited Cases
If plaintiffs show that a federal statute creates a right, the right is presumptively enforceable under § 1983; plaintiffs do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes. 42 U.S.C.A. § 1983.

[7] Civil Rights ⚿1027
78k1027 Most Cited Cases

[7] Civil Rights ⚿1307
78k1307 Most Cited Cases
The state may rebut presumption that right created by federal statute is enforceable under § 1983 by showing that Congress specifically foreclosed a remedy under § 1983; state's burden is to demonstrate that Congress shut the door to private enforcement either expressly, through specific evidence from the statute itself, or impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983. 42 U.S.C.A. § 1983.

[8] Federal Civil Procedure ⚿103.2
170Ak103.2 Most Cited Cases

[8] Federal Civil Procedure ⚿103.3
170Ak103.3 Most Cited Cases
In order to satisfy the standing requirements of Article III of the Constitution, a plaintiff must show: (1) it has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. U.S.C.A. Const. Art. 3, § 1 et seq.

[9] Associations ⚿20(1)
41k20(1) Most Cited Cases
Association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit; individual participation of organization's members is not normally necessary when an association seeks prospective or injunctive relief for its members. U.S.C.A. Const. Art. 3, § 1 et seq.

[10] Elections ⚿223
144k223 Most Cited Cases
Political parties and labor organizations had standing to assert the rights of their individual members who would vote in upcoming election to cast provisional ballots under Help America Vote Act (HAVA); plaintiffs were not require to identify specific voters who would seek to vote at a polling place that would be deemed wrong by election workers. U.S.C.A. Const. Art. 3, § 1 et seq.; Help America Vote Act of 2002, § 302(a)(2), 42 U.S.C.A. § 15482(a)(2).

[11] Elections ⚿223
144k223 Most Cited Cases
Directive of Ohio Secretary of State requiring a voter's residence in a precinct to be determined on the spot by a poll worker, and empowering poll workers to deny a voter a provisional ballot if the voter's residence in the correct precinct could not be confirmed, violated provision of Help America Vote Act (HAVA) permitting any individual who affirms that he or she is a registered voter in the jurisdiction in which the individual desires to vote and is eligible to vote in an election for Federal office to cast a provisional ballot. Help America Vote Act of 2002, § 302(a), 42 U.S.C.A. § 15482(a)

[12] Elections ⚿223
144k223 Most Cited Cases
Provision of Help America Vote Act (HAVA) permitting voters to cast provisional ballots if they affirm they are registered in the "jurisdiction" permitted Ohio voters to cast provisional ballots only in their precincts of residence; HAVA did not permit them to cast ballot in any precinct in county in which they resided. Help America Vote Act of 2002, § 302(a), 42 U.S.C.A. § 15482(a); Ohio R.C. § 3501.11(U, Y).

[13] Elections ⚿223
144k223 Most Cited Cases
Directive issued by Ohio Secretary of State permitting an individual who is advised that he or she does not appear to be eligible to vote in the precinct in question to cast a provisional ballot if he or she affirmed the voting residence in writing satisfied requirements of Help America Vote Act (HAVA); although required affirmation did not require voters to affirm in so many words that they were eligible to vote or registered in their assigned

precinct, it asked less of voters than HAVA permitted. Help America Vote Act of 2002, § 302(a), 42 U.S.C.A. § 15482(a).

[14] Elections ⇐239

144k239 Most Cited Cases

Help America Vote Act (HAVA) did not require provisional ballots cast in the wrong precinct to be counted as valid ballots in Ohio when cast in the correct county. Help America Vote Act of 2002, § 302(a)(4), 42 U.S.C.A. § 15482(a)(4); Ohio R.C. § 3503.01.

[15] Elections ⇐239

144k239 Most Cited Cases

Help America Vote Act (HAVA) does not require that any particular ballot, whether provisional or "regular," must be counted as valid; states remain free to count such votes as valid, but remain equally free to mandate that only ballots cast in the correct precinct will be counted. Help America Vote Act of 2002, § 302(a)(4), 42 U.S.C.A. § 15482(a)(4).

ON BRIEF: Richard G. Lillie, Gretchen A. Holderman, Benesch, Friedlander, Coplan & Aronoff, Cleveland, Ohio, Truman A. Greenwood, Theodore M. Rowen, James P. Silk, Jr., Spengler Nathanson, Toledo, Ohio, William M. Todd, Squire, Sanders & Dempsey, Columbus, Ohio, Pierre H. Bergeron, Squire, Sanders & Dempsey, Cincinnati, Ohio, for Appellants. Fritz Byers, Toledo, Ohio, Samuel Bagenstos, St. Louis, Missouri, for Appellees. David K. Flynn, Christopher C. Wang, Department of Justice, Civil Rights Division, Washington, D.C., William N. Nettles, Columbia, South Carolina, Kurtis A. Tunnell, Anne Marie Sferra, Maria Armstrong, Bricker & Eckler, Columbus, Ohio, John L. Ryder, Harris, Shelton, Dunlap, Cobb & Ryder, Memphis, Tennessee, Kathleen A. Behan, Jennifer A. Karmonick, Arnold & Porter, Washington, D.C., Johanna R. Pirko, Los Angeles, California, Raymond W. Lembke, Cincinnati, Ohio, for Amici Curiae.

Before: BOGGS, Chief Judge; GILMAN, Circuit Judge; and WEBER, District Judge. [FN*]

PER CURIAM.

***1** At bottom, this is a case of statutory interpretation. Does the Help America Vote Act require that all states count votes (at least for most federal elections) cast by provisional ballot as legal votes, even if cast in a precinct in which the voter does not reside, so long as they are cast within a "jurisdiction" that may be as large as a city or county of millions of citizens? We hold that neither the statutory text or structure, the legislative history, nor the understanding, until now, of those concerned with voting procedures compels or even permits that conclusion. Thus, although we affirm many of the rulings of the district court and its proper orders requiring compliance with HAVA's requirements for the casting of provisional ballots, we hold that ballots cast in a precinct where the voter does not reside and which would be invalid under state law for that reason are not required by HAVA to be considered legal votes.

To hold otherwise would interpret Congress's reasonably clear procedural language to mean that political parties would now be authorized to marshal their supporters at the last minute from shopping centers, office buildings, or factories, and urge them to vote at whatever polling place happened to be handy, all in an effort to turn out every last vote regardless of state law and historical practice. We do not believe that Congress quietly worked such a revolution in America's voting procedures, and we will not order it.

I

The States long have been primarily responsible for regulating federal, state, and local elections. These regulations have covered a range of issues, from registration requirements to eligibility requirements to ballot requirements to vote-counting requirements. *See Storer v. Brown,* 415 U.S. 724, 730, 94 S.Ct. 1274, 39 L.Ed.2d 714 (1974) ("[T]he States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates."). One aspect common to elections in almost every state is that voters are required to vote in a particular precinct. Indeed, in at least 27 of the states using a precinct voting system, including Ohio, a voter's ballot will only be counted as a valid ballot if it is cast in the correct precinct. [FN1]

The advantages of the precinct system are significant and numerous: it caps the number of voters attempting to vote in the same place on election day; it allows each precinct ballot to list all of the votes a citizen may cast for all pertinent federal, state, and local elections, referenda, initiatives, and levies; it allows each precinct ballot to list only those votes a citizen may cast, making ballots less confusing; it makes it easier for election officials to monitor votes and prevent election fraud; and it generally puts polling places in closer proximity to voter residences.

***2** The responsibility and authority of the States in this field are not without limit. Although the United States Constitution, and Supreme Court decisions interpreting the Constitution, give primary responsibility for administering and regulating elections to the States, the States must adhere to certain constitutional and statutory requirements. States may not in any election deny or abridge the right to vote on the basis of race, *see* U.S. Const. amend. XV § 1, for example, and must adhere to the principle of one person, one vote, *see Reynolds v. Sims*, 377 U.S. 533, 565-566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). In addition, Congress has imposed upon the States certain statutory requirements for the administration of federal elections, such as the National Voter Registration Act, 42 U.S.C. § 1973gg *et seq.* ("NVRA"). In 2002, Congress passed the Help America Vote Act, Pub.L. 107- 252. Title III, § 302, 116 Stat. 1706 (codified at 42 U.S.C. § 15301 *et seq.*) ("HAVA"), which is the subject of this appeal.

HAVA was passed in order to alleviate "a significant problem voters experience [, which] is to arrive at the polling place believing that they are eligible to vote, and then to be turned away because the election workers cannot find their names on the list of qualified voters." H.R. Rep. 107-329 at 38 (2001). HAVA dealt with this problem by creating a system for provisional balloting, that is, a system under which a ballot would be submitted on election day but counted if and only if the person was later determined to have been entitled to vote.

Section 302 of HAVA, the section most pertinent to this appeal, requires States to provide voters with the opportunity to cast provisional ballots and to post certain information about provisional ballots at polling places on election day. The section's requirements relating to the casting of provisional ballots are as follows:

(a) Provisional voting requirements. If an individual declares that such individual is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office, but the name of the individual does not appear on the official list of eligible voters for the polling place or an election official asserts that the individual is not eligible to vote, such individual shall be permitted to cast a provisional ballot as follows:

(1) An election official at the polling place shall notify the individual that the individual may cast a provisional ballot in that election.

(2) The individual shall be permitted to cast a provisional ballot at that polling place upon the execution of a written affirmation by the individual before an election official at the polling place stating that the individual is--

(A) a registered voter in the jurisdiction in which the individual desires to vote; and

(B) eligible to vote in that election.

(3) An election official at the polling place shall transmit the ballot cast by the individual or the voter information contained in the written affirmation executed by the individual under paragraph (2) to an appropriate State or local election official for prompt verification under paragraph (4).

***3** (4) If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law.

(5)(A) At the time that an individual casts a provisional ballot, the appropriate State or local election official shall give the individual written information that states that any individual who casts a provisional ballot will be able to ascertain under the system established under subparagraph (B) whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted.

(B) The appropriate State or local election official shall establish a free access system (such as a toll-free telephone number or an Internet

website) that any individual who casts a provisional ballot may access to discover whether the vote of that individual was counted, and, if the vote was not counted, the reason that the vote was not counted.

42 U.S.C. § 15482.

[1][2] In essence, HAVA's provisional voting section is designed to recognize, and compensate for, the improbability of "perfect knowledge" on the part of local election officials. *See Florida Democratic Party v. Hood,* 2004 WL 2414419, at 13 (N.D.Fla. Oct. 21, 2004) (order granting preliminary injunction). "If a person presents at a polling place and seeks to vote, and if that person would be allowed to vote by an honest election worker with perfect knowledge of the facts and law, then the person's vote should count." *Ibid.* But because any given election worker may not in fact have perfect knowledge, the person who claims eligibility to vote, but whose eligibility to vote at that time and place cannot be verified, is entitled under HAVA to cast a provisional ballot. *Ibid.* "On further review--when, one hopes, perfect or at least more perfect knowledge will be available--the vote will be counted or not, depending on whether the person was indeed entitled to vote at that time and place." *Ibid.*

II

On September 27, 2004, the Sandusky County Democratic Party, the Ohio Democratic Party, and three labor unions ("Appellees") filed an action in the United States District Court for the Northern District of Ohio against J. Kenneth Blackwell, Ohio Secretary of State ("the Secretary"). [FN2] Appellees' Complaint alleged that the Secretary's promulgation to Ohio County Boards of Elections of *Ohio Secretary of State Directive 2004-33* (" *Directive 2004-33* ") conflicts with the requirements of HAVA. *Directive 2004-33* states, in pertinent part, that:

> State law further provides that an eligible elector who moves from one Ohio precinct to another before an election may, in accordance with the procedures set forth in R.C. 3503.16, update his or her existing voter registration to the new voting residence address and vote a provisional ballot for the precinct in which the person's new voting residence is located. The provisional ballot will be counted in the official canvass if the county board of elections confirms that the person was timely registered to vote in another Ohio precinct, and that the person did not vote or attempt to vote in that election using the person's former voting residence address.
>
> ***4** Because R.C. 3599.12 specifically prohibits anyone from voting or attempting to vote in any election in a precinct in which that person is not a legally qualified elector, pollworkers in a precinct must confirm before issuing a provisional ballot that the person to whom the provisional ballot will be issued is a resident of the precinct, or portion of the precinct, in which the person desires to vote.
>
> ....
>
> Only after the precinct pollworkers have confirmed that the person is eligible to vote in that precinct shall the pollworkers issue a provisional ballot to that person. Under no circumstances shall precinct pollworkers issue a provisional ballot to a person whose address is not located in the precinct, or portion of the precinct, in which the person desire to vote.

Directive 2004-33. Appellees alleged that Directive 2004-33 violates HAVA because, *inter alia,* it limits a voter's right to cast a provisional ballot to those situations where a voter has moved from one Ohio precinct to another; allows poll workers to withhold a provisional ballot from anyone who is not-- according to the poll worker's on-the-spot determination at the polling place-- a resident of the precinct in which the would-be voter desires to cast a provisional ballot; does not require that potential voters be notified of their right to cast a provisional ballot; and unduly limits the circumstances in which a provisional ballot will be counted as a valid ballot.

On October 14, 2004, the district court issued an Order granting preliminary injunctive relief to Appellees. *Sandusky County Democratic Party v. Blackwell,* No. 3:04CV7582 (N.D.Ohio Oct.18, 2004) ("Order"). The district court found that HAVA created an individual right to cast a provisional ballot in accordance with the requirements of 42 U.S.C. § 15482(a), that this right is individually enforceable under 42 U.S.C. § 1983, and that Appellees had standing to bring a § 1983 action on behalf of Ohio voters. The district court's injunction required that the Secretary issue a

revised directive that (1) permits any voter to cast a provisional ballot upon affirming that he or she is eligible to vote and is registered to vote in the county in which he or she wishes to vote; (2) requires poll workers to notify any voter making this affirmation of his or her right to cast a provisional ballot, even if the poll worker determines that the voter does not reside in the precinct in which he or she is attempting to vote; and (3) that provisional ballots cast by a voter in the county in which he or she is registered to vote must be counted as a valid ballot even if it was not cast in the precinct in which the voter resides.

On October 15, 2004, Defendant-Appellee and Intervenors appealed the district court's Order to this court. On October 22, 2004, in response to the district court's October 14 Order, and two subsequent Orders issued on October 20, 2004, the Secretary sent to all Ohio County Election Boards two revised directives, designed to comply with the district court's injunction in the event that the October 14, 2004 Order was upheld by this court in full or in part. The revised directives are largely identical, and differ primarily with regard to whether provisional ballots cast outside a voter's precinct of residence will be counted as valid ballots. [FN3]

III

*5 [3] HAVA does not itself create a private right of action. Appellees contend that HAVA creates a federal right enforceable against state officials under 42 U.S.C. § 1983. With respect to the right to cast a provisional ballot under the circumstances described in HAVA § 302(a), we agree.

[4][5] Section 1983 provides a cause of action against any person who, acting under color of state law, abridges rights created by the Constitution or the laws of the United States. *Maine v. Thiboutot,* 448 U.S. 1, 4-8, 100 S.Ct. 2502, 65 L.Ed.2d 555 (1980). Only "unambiguously conferred" rights will support a § 1983 action. *Gonzaga Univ. v. Doe,* 536 U.S. 273, 283, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). "Section 1983 provides a remedy only for the deprivation of 'rights, privileges, or immunities secured by the Constitution and laws' of the United States," and, therefore, "it is *rights,* not the broader or vaguer 'benefits' or 'interests,' that may be enforced under the authority of that section." *Ibid.* In *Blessing v. Freestone,* 520 U.S. 329, 340-41, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997), the Supreme Court set out three factors that guide the inquiry into whether Congress intended to create a right:

> First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

Ibid. (citations omitted).

[6][7] If plaintiffs show that the statute creates a right, the right is presumptively enforceable under § 1983. *Gonzaga,* 536 U.S. at 284, 122 S.Ct. 2268. Plaintiffs "do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Ibid.* The state may rebut this presumption by showing that Congress specifically foreclosed a remedy under § 1983. *Id.* at 285 n. 4, 122 S.Ct. 2268. "The state's burden is to demonstrate that Congress shut the door to private enforcement either expressly, through 'specific evidence from the statute itself,' or 'impliedly, by creating a comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983.' " *Ibid.* (internal citations omitted).

The rights-creating language of HAVA § 302(a)(2) is unambiguous. That section states that upon making the required affirmation, an "*individual shall be permitted* to cast a provisional ballot." 42 U.S.C. § 15482(a)(2) (emphasis added). This language mirrors the rights-creating language of Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, which both state that "[n]o person ... shall ... be subjected to discrimination," *see* 42 U.S.C.2000d; 20 U.S.C. 1681(a), and which both create individual rights enforceable under § 1983, *see Gonzaga,* 536 U.S. at 284, 122 S.Ct. 2268. By way of contrast, this language markedly differs from the statutory language found by the Supreme Court in *Gonzaga*

to be insufficiently focused on the benefited class to create an individually enforceable right: "[n]o funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records ...." *See id.* at 279, 122 S.Ct. 2268 (citing 20 U.S.C. § 1232g(b)(1)). HAVA also refers explicitly to the "*right of an individual to cast a provisional ballot,*" 42 U.S.C. § 15482(b)(2)(E) (emphasis added), and requires states to post information at polling places about this right along with "instructions on how to contact the appropriate officials if *these rights* are alleged to have been violated," *ibid.* (emphasis added). The right to cast a provisional ballot is neither vague nor amorphous, and is no less amenable to judicial interpretation and enforcement than any other federal civil right. *See Blessing,* 520 U.S. at 340-41, 117 S.Ct. 1353. And there can be no doubt that HAVA as a whole is "couched in mandatory, rather than precatory, terms." *See id.* at 341, 117 S.Ct. 1353.

*6 Individual enforcement of this right under § 1983 is not precluded by either the explicit language of HAVA, or by a comprehensive enforcement scheme incompatible with individual enforcement. We have reviewed both HAVA's requirement that those States wishing to receive certain types of federal funding must provide administrative procedures by which citizen complaints may be reviewed and resolved, *see* 42 U.S.C. § 15512, and its provision that the U.S. Attorney General may bring a civil action to enforce HAVA's requirements, *see id.* § 15511. We do not find that these provisions, taken together, indicate a congressional intention to "shut the door" to federal judicial review of state actions, which would be otherwise unavailable to citizens whose right to vote provisionally has been denied or abridged.

IV

We review the district court's determination of standing *de novo* because the issue of whether a claimant has constitutional standing is a question of law. *United States v. Bridwell's Grocery & Video,* 195 F.3d 819, 821 (6th Cir.1999).

[8][9][10] Appellees are political parties and labor organizations. They claim standing to assert their own rights, and also the rights of their individual members. In order to satisfy the standing requirements of Article III of the Constitution, a plaintiff must show: "(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.,* 528 U.S. 167, 180-81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992)). "An association has standing to bring suit on behalf of its members when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Id.* at 181, 120 S.Ct. 693 (citing *Hunt v. Wash. State Apple Adver. Comm'n,* 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977)). The individual participation of an organization's members is "not normally necessary when an association seeks prospective or injunctive relief for its members." *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.,* 517 U.S. 544, 546, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996) (citing *Hunt,* 432 U.S. at 343, 97 S.Ct. 2434).

Under these principles, Appellees have standing to assert, at least, the rights of their members who will vote in the November 2004 election. Appellees have not identified specific voters who will seek to vote at a polling place that will be deemed wrong by election workers, but this is understandable; by their nature, mistakes cannot be specifically identified in advance. Thus, a voter cannot know in advance that his or her name will be dropped from the rolls, or listed in an incorrect precinct, or listed correctly but subject to a human error by an election worker who mistakenly believes the voter is at the wrong polling place. It is inevitable, however, that there will be such mistakes. The issues Appellees raise are not speculative or remote; they are real and imminent.

V

*7 HAVA requires that any individual affirming

that he or she "is a registered voter in the jurisdiction in which the individual desires to vote and that the individual is eligible to vote in an election for Federal office ... shall be permitted to cast a provisional ballot." *See* 42 U.S.C. § 15482(a).

[11] *Directive 2004-33* contravenes this requirement because it requires that a voter's residence in a precinct be determined on the spot by a poll worker, and empowers poll workers to deny a voter a provisional ballot if the voter's residence in the correct precinct cannot be confirmed. *See Directive 2004-33* ("Before issuing a provisional ballot as provided for under state or federal law, the pollworkers must confirm that the voting residence address claimed by the voter is located within the area shown on the precinct map and listed on the street listing."). As we explained above, the primary purpose of HAVA was to prevent on-the-spot denials of provisional ballots to voters deemed ineligible to vote by poll workers. Under HAVA, the only permissible requirement that may be imposed upon a would-be voter before permitting that voter to cast a provisional ballot is the affirmation contained in § 15482(a): that the voter is a registered voter in the jurisdiction in which he or she desires to vote, and that the voter is eligible to vote in an election for federal office.

[12] Unfortunately, HAVA does not define what "jurisdiction" means in this context, which leaves unclear whether a voter must affirm that he or she is registered to vote in the *precinct* in which he or she desires to vote, the *county* in which he or she desires to vote, or even simply the *state* in which he or she desires to vote. The district court concluded that the term should be given the same meaning as the term "registrar's jurisdiction" is given in the NVRA; namely the geographic reach of the unit of government that maintains the voter registration rolls, *see* 42 U.S.C. § 1973gg-6(j), which in Ohio is each county board of election, *see* Ohio Rev.Code Ann. §§ 3501.11(U), (Y) (West 2004). The district court offered two bases for its conclusion: first, the statement by Senator Dodd on the Senate floor that "[i]t is our intent that the word 'jurisdiction' ... has the same meaning as the term 'registrar's jurisdiction' in section 8(j) of the National Voter Registration Act," 148 Cong. Rec. S2535 (daily ed. Apr. 11, 2002); and second, the court's belief that permitting provisional ballots to be cast by voters outside their home precincts would further HAVA's purpose of preserving the federal franchise. [FN4]

We disagree with the district court's interpretation of the term "jurisdiction." Senator Dodd's statement must be weighed against other statements in HAVA's legislative history that suggest quite the contrary--that jurisdiction means the particular state subdivision within which a particular State's laws require votes to be cast. Senator Bond, one of HAVA's floor managers, stated:

> ***8** Congress has said only that voters in Federal elections should be given a provisional ballot if they claim to be registered in a particular jurisdiction and that jurisdiction does not have the voter's name on the list of registered voters.... *This provision is in no way intended to require any State or locality to allow voters to vote from any place other than the polling site where the voter is registered.*

148 Cong. Rec. S10488, S10493 (daily ed. Oct. 16, 2002) (emphasis added). Senator Bond also noted:

> Additionally, it is inevitable that voters will mistakenly arrive at the wrong polling place. If it is determined by the poll worker that the voter is registered but has been assigned to a different polling place, it is the intent of the authors of this bill that the poll worker can direct the voter to the correct polling place. *In most states, the law is specific on the polling place where the voter is to cast his ballot. Again, this bill upholds state law on that subject.*

148 Cong. Rec. at S10491 (emphasis added).

Nor can the use of the NVRA's definition of "registrar's jurisdiction" be justified on the ground that doing so will further HAVA's purpose of preserving the franchise. For one thing, permitting voters to cast ballots in any precinct within their county of residence may cause logistical problems at certain favored polling places that outweigh some or all of the benefits expected by the district court. For another, even if importing language from the NVRA will in this case have the effect of expanding the opportunities of Ohioans to vote on election day, so too would ordering that provisional ballots may be cast by any Ohio voter anywhere in the state. Absent an independent reason for turning to the NVRA's definition, the mere fact that equating "jurisdiction" with "county" may have a salutary

effect on the franchise cannot suffice to justify reading the language of HAVA in this way.

" 'Jurisdiction,' it has been observed, 'is a word of many, too many, meanings.' " *Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 90, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) (internal citation omitted). In the absence of a compelling reason for defining HAVA's use of this term to mean the geographic reach of the unit of government that maintains the voter registration rolls, we look to the overall scheme of the statute to determine its meaning. *See United States v. Choice,* 201 F.3d 837, 840 (6th Cir.2000) (ruling that "this court also looks to the language and design of the statute as a whole in interpreting the plain meaning of statutory language") (internal quotation marks and citation omitted). Nowhere in the language or structure of HAVA as a whole is there any indication that the Congress intended to strip from the States their traditional responsibility to administer elections; still less that Congress intended that a voter's eligibility to cast a provisional ballot should exceed her eligibility to cast a regular ballot. After all, the whole point of provisional ballots is to allow a ballot to be cast by a voter who claims to be eligible to cast a regular ballot, pending determination of that eligibility.

***9** [13] In Ohio, like many other states, a voter may cast a ballot only in his or her precinct of residence. *See* Ohio Rev.Code Ann. § 3503.01 (West 2004) (providing that an eligible voter "may vote at all elections in the precinct in which the citizen resides"); Ohio Rev.Code Ann. § 3599.12(A)(1) (West 2004) (making it a crime under Ohio law for a voter to knowingly vote anywhere except in the precinct in which he or she resides). As such, in Ohio, HAVA requires that a provisional ballot be issued only to voters affirming that they are eligible to vote and are registered to vote in the precinct in which they seek to cast a ballot. Directive Number 2 satisfies this requirement, and is even more lenient. Directive Number 2 requires only that if an individual wishes to cast a provisional ballot after being advised that he or she does not appear to be eligible to vote in the precinct in question, the individual shall be permitted to cast a provisional ballot upon executing the following written affirmation:

> I affirm that my name is _____, that my date of birth is _____, and at this time my voting residence is _____ in the City/Village of _____ in _____ County of the State of Ohio and that this is the only ballot I am casting in this election.
> If I am voting elsewhere than the precinct where I reside, I understand that my entire ballot may not be counted.

Although this affirmation does not require voters to affirm in so many words that they are eligible to vote or registered in their assigned precinct, this aspect of Directive Number 2 comports with HAVA's requirements because it asks less of voters than HAVA permits. HAVA's requirements "are minimum requirements," permitting deviation from its provisions provided that such deviation is "more strict than the requirements established under" HAVA in terms of encouraging provisional voting, and is "not inconsistent with the Federal requirements" mandated by HAVA. *See* 42 U.S.C. § 15484.

HAVA is quintessentially about being able to *cast* a provisional ballot. No one should be "turned away" from the polls, but the ultimate legality of the vote cast provisionally is generally a matter of state law. Any error by the state authorities may be sorted out later, when the provisional ballot is examined, in accordance with subsection (a)(4) of section 15482. But the voter casts a provisional ballot at the peril of not being eligible to vote under state law; if the voter is not eligible, the vote will then not be counted. Directive 2 exactly preserves this distinction, while generally curing the other defects correctly found by the district court.

VI

[14] In addition to finding that HAVA requires that voters be permitted to cast provisional ballots upon affirming their registration to vote in the county within which they desire to vote, the district court also held that provisional ballots must be counted as valid ballots when cast in the correct county. We disagree.

***10** The only subsection of HAVA that addresses the issue of whether a provisional ballot will be counted as a valid ballot conspicuously leaves that determination to the States. That subsection

provides:

> "If the appropriate State or local election official to whom the ballot or voter information is transmitted under paragraph (3) determines that the individual is eligible under State law to vote, the individual's provisional ballot shall be counted as a vote in that election in accordance with State law."

42 U.S.C. § 15482(a)(4). The district court interpreted this subsection to require the following procedure after a provisional ballot has been cast: First, an election official determines whether the individual who cast the ballot was eligible to vote in the broadest possible sense of that term. In essence, the district court would have state officials ask only whether a voter was eligible to vote *in some polling place* within the county at the start of election day. Even someone who has "voted 'improperly' " remains eligible in this sense of eligibility. Order at 26. Second, if the voter is deemed eligible to vote, the provisional ballot is deemed valid, and may then be tallied along with all the other valid ballots in accordance with State rules for tallying votes accurately and promptly. The district court, in other words, interpreted HAVA as leaving to state law only "*how* the ballots are counted" while federal law determines "*whether* they are to be counted." *Id.* at 27. Because the district court found that voters are eligible to vote under Ohio law anywhere in their county of residence, the court held that a provisional ballot cast anywhere in a voter's county of residence must be counted as valid.

The district court's interpretation of this subsection of HAVA is incorrect. To read "eligible under state law to vote" so broadly as to mean not only that a voter must simply be eligible to vote *in some polling place* within the county, but remains eligible even after casting an improper ballot would lead to the untenable conclusion that Ohio must count as valid a provisional ballot cast in the correct county even it is determined that the voter in question had previously voted elsewhere in that county; an impropriety that would not render that voter ineligible based upon the district court's interpretation of HAVA. State law concerning eligibility to vote is not limited to facts about voters as they arise from slumber on election day; they also stipulate, for example, that a voter is eligible to vote only once in each election, and, in Ohio, where a voter is eligible to cast a ballot. In other words, being eligible under State law to vote means eligible to vote *in this specific election in this specific polling place.*

Under Ohio law, a voter is eligible to vote in a particular polling place only if he or she resides in the precinct in which that polling place is located:

> Every citizen of the United States who is of the age of eighteen years or over and who has been a resident of the state thirty days immediately preceding the election at which the citizen offers to vote, is a *resident of the county and precinct* in which the citizen offers to vote, and has been registered to vote for thirty days, has the qualifications of an elector and *may vote at all elections in the precinct in which the citizen resides.*

***11** Ohio Rev.Code Ann. § 3503.01 (West 2004) (emphasis added); *see also Bell v. Marinko,* 235 F.Supp.2d 772, 776 (N.D.Ohio 2002), *aff'd,* 367 F.3d 588 (6th Cir.2004) ("One simply cannot be a 'qualified elector' entitled to vote unless one resides in the precinct where he or she seeks to cast [a] ballot.") (citing *In re Protest Filed with Franklin County Bd. of Elections,* 551 N.E.2d 150, 152 (Ohio 1990)). Indeed, it is a crime under Ohio law for a voter knowingly to vote anywhere except in the precinct in which he or she resides. Ohio Rev.Code Ann. § 3599.12(A)(1). Under Ohio law, then, only ballots cast in the correct precinct may be counted as valid.

There is no reason to think that HAVA, which explicitly defers determination of whether ballots are to be counted to the States, should be interpreted as imposing upon the States a federal requirement that out-of-precinct ballots be counted, thereby overturning the longstanding precinct-counting system in place in more than half the States. The phrase "eligible under State law to vote" certainly provides no reason to believe this was Congress's intent. Even if one concludes from our disagreement with the district court's interpretation of this phrase that it is somewhat ambiguous, that fact alone is an insufficient basis for inferring a congressional intent to impose federal requirements upon the States in this way. *See United States v. Bass,* 404 U.S. 336, 349, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) ("[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the

federal-state balance."); *see also Penn Dairies, Inc. v. Milk Control Comm'n,* 318 U.S. 261, 275, 63 S.Ct. 617, 87 L.Ed. 748 (1943) ("An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous.").

Nor does the legislative history of the statute provide any reason to believe that HAVA requires that ballots cast in the wrong precinct be counted. Senator Bond, for example, stated that "ballots will be counted according to state law.... It is not the intent of the authors to overturn State laws regarding registration or state laws regarding the jurisdiction in which a ballot must be cast to be counted." 148 Cong. Rec. at S10491. Senator Dodd also noted: "Whether a provisional ballot is counted or not depends solely on State law, and the conferees clarified this by adding language in section 302(a)(4) stating that a voter's eligibility to vote is determined under State law." 148 Cong. Rec. at S10510. Moreover, he added that "[n]othing in this compromise usurps the state or local election official's sole authority to make the final determination with respect to whether or not an applicant is duly registered, whether the voter can cast a regular ballot, or whether that vote is duly counted." *Ibid. See also id.* at S10504 (noting that HAVA does not establish "a Federal definition of when a voter is registered or how a vote is counted").

***12** [15] We therefore hold that HAVA does not require that any particular ballot, whether provisional or "regular," must be counted as valid. States remain free, of course, to count such votes as valid, but remain equally free to mandate, as Ohio does, that only ballots cast in the correct precinct will be counted.

It should be noted that this holding in no way rests upon our discussion above about the meaning of the term "jurisdiction." Even if the district court was correct to find that provisional ballots must be *offered* to any voter affirming residence in the county in which he or she desires to vote, it remains true that HAVA's single provision relating to the counting of ballots refers only to eligibility under State law to vote, and makes no reference either explicitly or implicitly to the jurisdiction in which a provisional ballot was cast. [FN5] In any event, there is no contradiction between requiring all voters in a county to be given a provisional ballot in case they are subsequently found to reside in the precinct in which they seek to vote, and then allowing the state to continue its practice of not counting votes cast outside of precinct. Although Congress certainly intended that some provisional ballots would be counted as valid after it was determined that voters should in fact have appeared on the list of qualified voters, there is no suggestion in either the legislative history of the statute or the statutory text that Congress intended all provisional ballots to be deemed valid.

Directive Number 2 therefore comports with HAVA's requirements insofar as it states that "An individual's provisional ballot will only be counted if he or she has voted in the proper precinct," and requires that poll workers "[a]dvise the voter that, if he or she does not vote at the correct precinct, the voter's ballot will not be counted for any issue or office."

VII

The judgment of the district court is therefore AFFIRMED IN PART, REVERSED IN PART, and REMANDED to the district court for further proceedings consistent with this opinion. The district court may order the Secretary to enforce the proffered "Revised Directive Number 2," with any appropriate technical modifications such as noted at footnote 3 of this opinion. The district court may not order the enforcement of "Revised Directive Number 1" or any other order requiring the counting of provisional votes cast outside the precinct of the voter's residence.

FN* The Honorable Herman J. Weber, Senior United States District Judge for the Southern District of Ohio, sitting by designation.

FN1. *See, e.g.,* Ala.Code § 17-10A-2 (1975 & Supp.2003); Ariz.Rev.Stat. § 16-584C (2004); Colo.Rev.Stat. § 1-9-304.5 (2004); Fla. Stat. Ann. § 101.048 (West 2004); Mass. Gen. Laws ch. 54, § 76C (2004); Mich. Comp. Laws §

168.523a (2004); Mont.Code Ann. § 13-13- 601 (2003); Neb.Rev.Stat. § 32-915 (2003); Nev.Rev.Stat. 293.3082 (2003); N.J. Stat. Ann. § 19:53C-20 (West 2003); Ohio Rev.Code Ann. § 3599.12 (West 2004); Okla. Stat. tit. 26, § 16-203 (2003); S.C.Code Ann. § 7-13-820 (Law.Co-op.2003); S.D. Codified Laws § 12-18-40 (Michie 2003); Tenn.Code Ann. § 2-7-112 (2003); Tex. Elec.Code Ann. § 63.011 (2004); Va.Code Ann. § 24.2-653 (Michie 2002); W. Va.Code § 3-2-1 (2004) ; Wyo. Stat. Ann. § 22-15-105 (Michie 2002). In addition, the election board of the District of Columbia, which operates under congressional supervision, if not direct control, has stated that it will require voters to cast provisional ballots at the proper polling place. *Moving Elections Forward in the District of Columbia: A Plan for Implementing the Help America Vote Act in the District of Columbia* (Aug.2003) at 13, *reprinted in* 69 Fed.Reg. 14,180, 14,186 (Mar. 24, 2004) (stating that "[s]ince voters casting special [provisional] ballots in the District of Columbia are required to cast these ballots in their assigned precinct, the Board will act to inform all voters of their assigned precinct in an election mailing prior to Election Day.").

FN2. On October 4, 2004, Thomas W. Noe, Glenn A. Wolfe, and Gregory L. Arnold ("Intervenors") filed a motion to intervene as individual voters. The district court granted that motion on October 7, 2004.

FN3. We note that Revised Directive Number 2, primarily at issue in this Opinion, does not contain any reference to the obligation of poll workers to provide individuals casting a provisional ballot "written information that states that any individual who casts a provisional ballot will be able to ascertain ... whether the vote was counted, and, if the vote was not counted, the reason that the vote was not counted." 42 U.S.C. § 15482(a)(5)(A). Because such language is contained in Revised Directive Number 1, we assume that its absence from Directive Number 2 is merely a drafting error, and that the final Directive implemented by the Secretary will contain this language, without which the Directive cannot fully comport with the requirements of HAVA.

FN4. Appellees contend that a further reason for concluding that the NVRA's definition of "registrar's jurisdiction" be imported to HAVA is that "Congress directed that the statute be construed in harmony with" the NVRA. *See* Appellee's Br. at 50. It is true that section 906 of HAVA provides that it should not be construed to supersede, restrict, or limit a number of other statutes, including the NVRA, but failing to import the NVRA's definition of "registrar's jurisdiction" would in no way supersede, restrict, or limit the NVRA.

FN5. Indeed, the requirement that ballots be issued county-wide is, even on the district court's reading, a federal requirement, which cannot be read into the statement that votes must be counted if a voter is determined to be eligible under State law.

--- F.3d ----, 2004 WL 2384445 (6th Cir.(Ohio))

Briefs and Other Related Documents (Back to top)

- 04-4266 (Docket)
  (Oct. 15, 2004)
- 04-4265 (Docket)
  (Oct. 15, 2004)

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78 S.Ct. 1332
357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460
(Cite as: 357 U.S. 513, 78 S.Ct. 1332)

Supreme Court of the United States

Lawrence SPEISER, Appellant,
v.
Justin A. RANDALL, as Assessor of Contra Costa County, State of California.
Daniel PRINCE, Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation.

Nos. 483 and 484.

Argued April 8, 9, 1958.
Decided June 30, 1958.
Rehearing Denied Oct. 13, 1958.

See 79 S.Ct. 12.

Actions to recover taxes paid to California tax authorities under protest and for declaratory relief. From a judgment of the Supreme Court of California, 48 Cal.2d 472, 311 P.2d 544, which affirmed the judgment of the Superior Court, City and County of San Francisco, for defendants and from the judgment of the Supreme Court of California, 48 Cal.2d 903, 311 P.2d 546, which reversed the judgment of the Superior Court, Contra Costa County for the plaintiffs, the taxpayers appealed. The Supreme Court, Mr. Justice Brennan, held, inter alia, that assuming that provision of California constitution making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption was constitutional, its enforcement through procedures whereby not only did the initial burden of bringing forth proof of nonadvocacy rest on taxpayer, but throughout judicial and administrative proceedings the burden lay on taxpayer of persuading the assessor, or the court, that he fell outside the class denied tax exemption, constituted a violation of due process, and hence veterans claiming exemption could not be required to execute declaration as a condition for obtaining a tax exemption or as a condition for assessor proceeding further in determining whether they were entitled to such an exemption.

Reversed and remanded.

Mr. Justice Clark dissented.

For concurring opinion see, 357 U.S. 513, 78 S.Ct. 1352.

West Headnotes

[1] Constitutional Law ⇨283
92k283 Most Cited Cases
A discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. U.S.C.A.Const. Amends. 1, 14.

[2] Constitutional Law ⇨283
92k283 Most Cited Cases
Speech can be effectively limited by exercise of the taxing power, and to deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech, and its deterrent effect is the same as if the state were to fine them for such speech. U.S.C.A.Const. Amends. 1, 14.

[3] Constitutional Law ⇨283
92k283 Most Cited Cases
Because a tax exemption is a "privilege" or "bounty" does not preclude its denial from constituting infringement of speech. U.S.C.A.Const. Amends. 1, 14.

[4] Constitutional Law ⇨283
92k283 Most Cited Cases
[4] Taxation ⇨195
371k195 Most Cited Cases
In determining whether provision of California constitution making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption, and oath requirement of implementing statute, violated free speech rights of veterans' tax exemption claimants, the denial of tax exemption for engaging in certain speech necessarily would have effect of coercing claimants to refrain from the proscribed speech, and denial was aimed at suppression of dangerous ideas.

West's Ann.Cal.Const. art. 13, § 1 1/4; art. 20, § 19; West's Ann.Cal.Rev. & Tax.Code, § 32; U.S.C.A.Const. Amends. 1, 14.

[5] Federal Courts ⇐433
170Bk433 Most Cited Cases
(Formerly 106k366(19))
The provisions of California constitution making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption, and of implementing statute requiring an oath by tax exemption claimant must be read in light of restrictive construction that the California Supreme Court, in exercise of its function of interpreting state law, has placed upon them to effect that California may deny tax exemptions to persons who engage in proscribed speech for which they might be fined or imprisoned. West's Ann.Cal.Const. art. 20, § 19; West's Ann.Cal.Rev. & Tax.Code, § 32.

[6] Constitutional Law ⇐90(1)
92k90(1) Most Cited Cases
(Formerly 92k90)
In dealing with complex of strands in the web of freedoms which make up free speech, operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in light of particular circumstances to which it is applied. U.S.C.A.Const. Amends. 1, 14.

[7] Administrative Law and Procedure ⇐309.1
15Ak309.1 Most Cited Cases
(Formerly 15Ak309)
In view of fact that vindication of legal rights depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents, the procedures by which facts of the case are determined assume an importance fully as great as the validity of substantive rule of law to be applied, and the more important the rights at stake the more important must be the procedural safeguards surrounding those rights.

[8] Constitutional Law ⇐90.1(1)
92k90.1(1) Most Cited Cases
(Formerly 92k90)
When the state undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights, and since only considerations of the greatest urgency can justify restrictions on speech, and since validity of a restraint on speech in each case depends on careful analysis of particular circumstances, the procedures by which facts of case are adjudicated are of special importance, and validity of restraint may turn on safeguards which they afford. U.S.C.A.Const. Amends. 1, 14.

[9] Federal Courts ⇐386
170Bk386 Most Cited Cases
(Formerly 106k366(1))
The construction of state laws is the exclusive responsibility of state courts.

[10] Constitutional Law ⇐42.3(2)
92k42.3(2) Most Cited Cases
(Formerly 92k42)
Where under California constitution making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption, not only did the initial burden of bringing forth proof of nonadvocacy rest on taxpayer, but throughout judicial and administrative proceedings the burden lay on taxpayer of persuading assessor, or the court, that he fell outside the class denied the tax exemption, and declaration under oath required by implementing statute was but a part of probative process by which the state sought to determine which taxpayers fell into the proscribed category, the declaration could not be regarded as having such independent significance that failure to sign it precluded review of the validity of the procedure of which it was a part. West's Ann.Rev. & Tax.Code, § 32; West's Ann.Const. art. 20, § 19; U.S.C.A.Const. Amends. 1 , 14.

[11] Constitutional Law ⇐318(1)
92k318(1) Most Cited Cases
(Formerly 92k318)
A state may regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, unless in so doing it offends some principle of justice so rooted in the traditions and conscience of the people as to be ranked as fundamental.

[12] Constitutional Law ⇐55
92k55 Most Cited Cases
The Supreme Court will strike down state statutes unfairly shifting the burden of proof.

[13] Constitutional Law ⇐274.1(1)
92k274.1(1) Most Cited Cases
(Formerly 92k274)
Due process may not always compel the full formalities of a criminal prosecution before criminal

advocacy can be suppressed or deterred, but the state which attempts to do so must provide procedures amply adequate to safeguard against invasion of speech which the constitution protects. U.S.C.A.Const. Amends. 1, 14.

[14] Constitutional Law ⚿284(1)
92k284(1) Most Cited Cases
In administration of tax program, taxpayer may be required to carry burden of introducing evidence to rebut determination of the collector, but a summary tax-collection procedure may be declared a violation of due process when purported tax is shown to be in reality a penalty for a crime. U.S.C.A.Const. Amend. 14.

[15] Constitutional Law ⚿284(1)
92k284(1) Most Cited Cases
Where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue, and it does not follow that because only a tax liability is involved, the ordinary tax assessment procedures are adequate when applied to penalize speech. U.S.C.A.Const. Amends. 1, 14.

[16] Constitutional Law ⚿90(1)
92k90(1) Most Cited Cases
(Formerly 92k90)
The line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. U.S.C.A.Const. Amend. 1.

[17] Constitutional Law ⚿266(7)
92k266(7) Most Cited Cases
(Formerly 92k266, 92k90)
There is always in litigation a margin of error, representing error in fact finding, which both parties must take into account, and where one party has at stake an interest of transcending value, as a criminal defendant his liberty, such margin of error is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at conclusion of the trial of his guilt beyond a reasonable doubt, and due process commands that no man shall lose his liberty unless the government has borne the burden of producing the evidence and convincing the factfinder of his guilt. U.S.C.A.Const. Amends. 1, 14.

[18] Constitutional Law ⚿283
92k283 Most Cited Cases
[18] Taxation ⚿195
371k195 Most Cited Cases
Under provision of California constitution making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption, and implementing statute requiring an oath to that effect, since transcendent value of speech was involved due process required that the state bear the burden of persuasion to show that the tax exemption claimants engaged in criminal speech. West's Ann.Cal.Rev. & Tax.Code, § 32; West's Ann.Cal.Const. art. 20, § 19; U.S.C.A.Const. Amends. 1, 14.

[19] Constitutional Law ⚿55
92k55 Most Cited Cases
A constitutional prohibition cannot be transgressed indirectly by creation of a statutory presumption any more than it can be violated by direct enactment, and the power to create presumptions is not a means of escape from constitutional restrictions.

[20] Constitutional Law ⚿283
92k283 Most Cited Cases
[20] Taxation ⚿195
371k195 Most Cited Cases
(Formerly 371k1195)
Under California constitution making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption, the procedure whereby not only the initial burden of bringing forth proof of nonadvocacy rested on taxpayer but throughout judicial and administrative procedure burden lay on taxpayer of persuading assessor, or the court, that he fell outside the class denied the tax exemption, as applied to veterans could not be upheld, notwithstanding procedure denied free speech, on ground that veterans as a class occupied a position of special trust and influence in community and that any veteran who engaged in proscribed advocacy constituted a special danger to the state since the state can act against the veteran only as it can act against any other citizen, by imposing penalties to deter unlawful conduct. West's Ann.Cal.Rev. & Tax.Code, § 32; West's Ann. Cal.Const. art. 13, § 1 1/4; art. 20, § 19; U.S.C.A.Const. Amends. 1, 14.

[21] Constitutional Law ⚿283
92k283 Most Cited Cases
When the constitutional right to speak is sought to be deterred by a state's general taxing program due process demands that the speech be unencumbered until the state comes forward with sufficient proof to justify its inhibition, since the state has no such compelling interest at stake as to justify a short-cut

procedure which must inevitably result in suppressing protected speech. U.S.C.A.Const. Amends. 1, 14.

[22] Constitutional Law ⚖283
92k283 Most Cited Cases
[22] Taxation ⚖195
371k195 Most Cited Cases
Assuming that provision of California constitution making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption was constitutional, its enforcement through procedures whereby not only did the initial burden of bringing forth proof of nonadvocacy rest on taxpayer, but throughout judicial and administrative proceedings the burden lay on taxpayer of persuading the assessor, or the court, that he fell outside the class denied tax exemption, constituted a violation of due process, and hence veterans claiming exemption could not be required to execute declaration as a condition for obtaining a tax exemption or as a condition for assessor proceeding further in determining whether they were entitled to such an exemption. West's Ann.Cal.Rev. & Tax.Code, § 32; West's Ann.Cal.Const. art. 13, § 1 1/4; art. 20, § 19; U.S.C.A.Const. Amends. 1, 14.

[23] Taxation ⚖251.1
371k251.1 Most Cited Cases
(Formerly 371k251)
Under provision of California constitution making nonadvocacy of overthrow of government by unlawful means a condition precedent to tax exemption, since the entire statutory procedure, by placing the burden of proof on claimants, violated requirements of due process, claimants were not obliged to take the first step in such a procedure. West's Ann.Cal.Rev. & Tax.Code, § 32; West's Ann.Cal.Const. art. 13, § 1 1/4; art. 20, § 19; U.S.C.A. Const. Amends. 1, 14.

****1336 *514** Mr. Lawrence Speiser, San Francisco, Cal., for appellants.

Mr. George W. McClure, Pittsburgh, Pa., for appellee Randall.

Mr. Robert M. Desky, San Francisco, Cal., for appellee City and County of San Francisco.

Mr. Justice BRENNAN delivered the opinion of the Court.

The appellants are honorably discharged veterans of World War II who claimed the veterans' property-tax ***515** exemption provided by Art. XIII, s 1 1/4, of the California Constitution. Under California law applicants for such exemption must annually complete a standard form of application and file it with the local assessor. The form was revised in 1954 to add an oath by the applicant: 'I do not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means, nor advocate the support of a foreign Government against the United States in event of hostilities.' Each refused to subscribe the oath and struck it from the form which he executed and filed for the tax year 1954--1955. Each contended that the exaction of the oath as a condition of obtaining a tax exemption was forbidden by the Federal Constitution. The respective assessors denied the exemption solely for the refusal to execute the oath. The Supreme Court of California sustained the assessors' actions against the appellants' claims of constitutional invalidity. [FN1] We noted probable jurisdiction of the appeals. 355 U.S. 880, 78 S.Ct. 148, 2 L.Ed.2d 111.

FN1. Appellant in No. 483 sued for declaratory relief in the Superior Court of Contra Costa County. Five judges sitting en banc held that both s 19 of Art. XX and s 32 of the Revenue and Taxation Code were invalid under the Fourteenth Amendment as restrictions on freedom of speech. The California Supreme Court reversed. 48 Cal.2d 903, 311 P.2d 546.
Appellant in No. 484 sued in the Superior Court for the City and County of San Francisco to recover taxes paid under protest and for declaratory relief. The court upheld the validity of both the constitutional provision and s 32 of the Code. The Supreme Court affirmed. 48 Cal.2d 472, 311 P.2d 544.
In both cases the Supreme Court adopted the reasoning of its opinion in First Unitarian Church of Los Angeles v. County of Los Angeles, 48 Cal.2d 419, 311 P.2d 508, in which identical issues are discussed at length. Hereinafter we will refer to that opinion as expressing the views of the California Supreme Court in

the present cases.

***516** Article XX, s 19, of the California Constitution, adopted at the general election of November 4, 1952, provides as follows:

'Notwithstanding any other provision of this Constitution, no person or organization which advocates the overthrow of the Government of the United States or the State by force or violence or other unlawful means or who advocates the support of a foreign government against the United States in the event of hostilities shall:

****1337** '(b) Receive any exemption from any tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State.

'The Legislature shall enact such laws as may be necessary to enforce the provisions of this section.'

To effectuate this constitutional amendment the California Legislature enacted s 32 of the Revenue and Taxation Code, which requires the claimant, as a prerequisite to qualification for any property-tax exemption, to sign a statement on his tax return declaring that he does not engage in the activities described in the constitutional amendment. [FN2] The California Supreme Court held that ***517** this declaration, like other statements required of those filing tax returns, was designed to relieve the tax assessor of 'the burden * * * of ascertaining the facts with reference to tax exemption claimants.' 48 Cal.2d 419, 432, 311 P.2d 508, 515. The declaration, while intended to provide a means of determining whether a claimant qualifies for the exemption under the constitutional amendment, is not conclusive evidence of eligibility. The assessor has the duty of investigating the facts underlying all tax liabilities and is empowered by s 454 of the Code to subpoena taxpayers for the purpose of questioning them about statements they have furnished. If the assessor believes that the claimant is not qualified in any respect, he may deny the exemption and require the claimant, on judicial review, to prove the incorrectness of the determination. In other words, the factual determination whether the taxpayer is eligible for the exemption under the constitutional amendment is made in precisely the same manner as the determination of any other fact bearing on tax liability.

FN2. Section 32 provides:

'Any statement, return, or other document in which is claimed any exemption, other than the householder's exemption, from any property tax imposed by this State or any county, city or county, city, district, political subdivision, authority, board, bureau, commission or other public agency of this State shall contain a declaration that the person or organization making the statement, return, or other document does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities. If any such statement, return, or other document does not contain such declaration, the person or organization making such statement, return, or other document shall not receive any exemption from the tax to which the statement, return, or other document pertains. Any person or organization who makes such declaration knowing it to be false is guilty of a felony. This section shall be construed so as to effectuate the purpose of Section 19 of Article XX of the Constitution.'

The appellants attack these provisions, inter alia, as denying them freedom of speech without the procedural safeguards required by the Due Process Clause of the Fourteenth Amendment. [FN3]

FN3. This contention was raised in the complaint and is argued in the brief in this Court. The California Supreme Court rejected the contention as without merit. 48 Cal.2d 472, 475, 311 P.2d 544, 545--546. Appellants also argue that these provisions are invalid (1) as invading liberty of speech protected by the Due Process Clause of the Fourteenth Amendment; (2) as denying equal protection because the oath is required only as to property-tax and corporation-income-tax exemptions, but not as to the householder's personal-income-tax, gift-tax, inheritance-tax, or sales-tax exemptions; and (3) as violating the Supremacy Clause

because this legislation intrudes in a field of exclusive federal control, Commonwealth of Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640.

Our disposition of the cases makes considerations of these questions unnecessary.

****1338 *518** I.

[1][2][3][4] It cannot be gainsaid that a discriminatory denial of a tax exemption for engaging in speech is a limitation on free speech. The Supreme Court of California recognized that these provisions were limitations on speech but concluded that 'by no standard can the infringement upon freedom of speech imposed by section 19 of article XX be deemed a substantial one.' 48 Cal.2d 419, 440, 311 P.2d 508, 521. It is settled that speech can be effectively limited by the exercise of the taxing power. Grosjean v. American Press Co., 297 U.S. 233, 56 S.Ct. 444, 80 L.Ed. 660. To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech. Its deterrent effect is the same as if the State were to fine them for this speech. The appellees are plainly mistaken in their argument that, because a tax exemption is a 'privilege' or 'bounty,' its denial may not infringe speech. This contention did not prevail before the California courts, which recognized that conditions imposed upon the granting of privileges or gratuities must be 'reasonable.' It has been said that Congress may not by withdrawal of mailing privileges place limitations upon the freedom of speech which if directly attempted would be unconstitutional. See Hannegan v. Esquire, Inc., 327 U.S. 146, 156, 66 S.Ct. 456, 461, 90 L.Ed. 586; cf. United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407, 430--431, 41 S.Ct. 352, 360--361, 65 L.Ed. 704 (Brandeis, J., dissenting). This Court has similarly rejected the contention that speech was not abridged when the ***519** sole restraint on its exercise was withdrawal of the opportunity to invoke the facilities of the National Labor Relations Board, American Communications Ass'n, C.J.O. v. Douds, 339 U.S. 382, 402, 70 S.Ct. 674, 685, 94 L.Ed. 925, or the opportunity for public employment, Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216. So here, the denial of a tax exemption for engaging in certain speech necessarily will have the effect of coercing the claimants to refrain from the proscribed speech. The denial is 'frankly aimed at the suppression of dangerous ideas.' American Communications Ass'n, C.I.O. v. Douds, supra, 339 U.S. at page 402, 70 S.Ct. at page 686.

[5] The Supreme Court of California construed the constitutional amendment as denying the tax exemptions only to claimants who engage in speech which may be criminally punished consistently with the free-speech guarantees of the Federal Constitution. The court defined advocacy of 'the overthrow of the Government * * * by force or violence or other unlawful means' and advocacy of 'support of a foreign government against the United States in event of hostilities' as reaching only conduct which may constitutionally be punished under either the California Criminal Syndicalism Act, Cal.Stat.1919, c. 188, see Whitney v. People of State of California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095, or the Federal Smith Act, 18 U.S.C. s 2385, 18 U.S.C.A. s 2385. 48 Cal.2d at page 428, 311 P.2d at page 513. It also said that it would apply the standards set down by this Court in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137, in ascertaining the circumstances which would justify punishing speech as a crime. [FN4] Of course the constitutional and statutory provisions here involved must be read in light of the restrictive construction that the California court, in the exercise of its function of interpreting state law, has placed upon them. For ***520** the purposes of this ****1339** case we assume without deciding that California may deny tax exemptions to persons who engage in the proscribed speech for which they might be fined or imprisoned. [FN5]

FN4. The California Supreme Court construed these provisions as inapplicable to mere belief. On oral argument counsel for the taxing authorities further conceded that the provisions would not apply in the case of advocacy of mere 'abstract doctrine.' See Yates v. United States, 354 U.S. 298, 312--327, 77 S.Ct. 1064, 1073--1081, 1 L.Ed.2d 1356.

FN5. Appellants contend that under this Court's decision in Commonwealth of

> Pennsylvania v. Nelson, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640, the State can no longer enforce its criminal statutes aimed at subversion. We need not decide whether this contention is sound; nor need we consider whether, if it is, it follows that California cannot deny tax exemptions to those who in fact are in violation of the federal and state sedition laws.

[6] But the question remains whether California has chosen a fair method for determining when a claimant is a member of that class to which the California court has said the constitutional and statutory provisions extend. When we deal with the complex of strands in the web of freedoms which make up free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied. Kingsley Books, Inc., v. Brown, 354 U.S. 436, 441--442, 77 S.Ct. 1325, 1327--1328, 1 L.Ed.2d 1469; Near v. State of Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357; cf. Cantwell v. State of Connecticut, 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213; Joseph Burstyn, Inc., v. Wilson, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098; Winters v. People of State of New York, 333 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840; Niemotko v. State of Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267; Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302.

[7][8] To experienced lawyers it is commonplace that the outcome of a lawsuit--and hence the vindication of legal rights--depends more often on how the factfinder appraises the facts than on a disputed construction of a statute or interpretation of a line of precedents. Thus the procedures by which the facts of the case are determined assume an importance fully as great as the validity of the substantive rule of law to be applied. And the more important the rights at stake the more important ***521** must be the procedural safeguards surrounding those rights. Cf. Powell v. State of Alabama, 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158. When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights--rights which we value most highly and which are essential to the workings of a free society. Moreover, since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, cf. Dennis v. United States, supra; Whitney v. People of State of California, supra, the procedures by which the facts of the case are adjudicated are of special importance and the validity of the restraint may turn on the safeguards which they afford. Compare Kunz v. People of State of New York, 340 U.S. 290, 71 S.Ct. 312, 95 L.Ed. 280, with Feiner v. People of State of New York, 340 U.S. 315, 71 S.Ct. 303, 95 L.Ed. 295. It becomes essential, therefore, to scrutinize the procedures by which California has sought to restrain speech.

[9][10] The principal feature of the California procedure, as the appellees themselves point out, is that the appellants, 'as taxpayers under state law, have the affirmative burden of proof, in Court as well as before the Assessor. * * * (I) t is their burden to show that they are proper persons to qualify under the self-executing constitutional provision for the tax exemption in question--i.e., that they are not persons who advocate the overthrow of the government of the United States or the State by ****1340** force or violence or other unlawful means or who advocate the support of a foreign government against the United States in the event of hostilities. * * * (T)he burden is on them to produce evidence justifying their claim of exemption.' [FN6] ***522** Not only does the initial burden of bringing forth proof of nonadvocacy rest on the taxpayer, but throughout the judicial and administrative proceedings the burden lies on the taxpayer of persuading the assessor, or the court, that he falls outside the class denied the tax exemption. The declaration required by s 32 is but a part of the probative process by which the State seeks to determine which taxpayers fall into the proscribed category. [FN7] Thus ***523** the declaration ****1341** cannot be regarded as having such independent significance that failure to sign it precludes review of the validity of the procedure of which it is a part. Cf. Staub v. City of Baxley, supra, 355 U.S. at pages 318--319, 78 S.Ct. at pages 280--281. The question for decision, therefore, is whether this allocation of the burden of proof, on an issue concerning freedom of speech, falls short of

the requirements of due process.

FN6. The California Supreme Court held that s 19 of Art. XX of the State Constitution was in effect self-executing. '(U)nder the tax laws of the state wholly apart from section 32 it is the duty of the assessor to ascertain the facts with reference to the taxability or exemption from taxation of property within his jurisdiction. And it is also the duty of the property owner to cooperate with the assessor and assist him in the ascertainment of these facts by declarations under oath.' 48 Cal.2d at page 430, 311 P.2d at pages 514--515.
In all events, if the assessor 'is satisfied from his investigations that the exemption should not be allowed he may assess the property as not exempt and if contested compel a determination of the facts in a suit to recover the tax paid under protest. In such a case it would be necessary for the claimant to allege and prove facts with reference to the nature, extent and character of the property which would justify the exemption and compliance with all valid regulations in the presentation and prosecution of the claim. In any event it is the duty of the assessor to ascertain the facts from any legal source available. In performing this task he is engaged in the assembly of facts which are to serve as a guide in arriving at his conclusion whether an exemption should or should not be allowed. That conclusion is in no wise a final determination that the claimant belongs to a class proscribed by section 19 of article XX or is guilty of any activity there denounced. The presumption of innocence available to all in criminal prosecutions does not in a case such as this relieve or prevent the assessor from making the investigation enjoined upon him by law to see that exemptions are not improperly allowed. His administrative determination is not binding on the tax exemption claimant but it is sufficient to authorize him to tax the property as nonexempt and to place the burden on the claimant to test the validity of his administrative determination in an action at law.' Id., 48 Cal.2d at pages 431--432, 311 P.2d at page 515.

FN7. It is suggested that the opinion of the California Supreme Court be read as holding that 'the filing, whether the oath be true or false, would conclusively establish the taxpayer's eligibility for an exemption.' But the California court expressly states that 'it is the duty of the assessor to see that exemptions are not allowed contrary to law and this of course includes those which are contrary to the prohibitions provided for in section 19 of article XX,' 48 Cal.2d 419, 431, 311 P.2d 508, 515, and that the 'mandatory and prohibitory' provision of s 19 of Art. XX 'applies to all tax exemption claimants.' Id., 48 Cal.2d at page 428, 311 P.2d at page 513. Indeed, the tax authorities of California themselves point out that the signing of the declaration is not conclusive of the right to the tax exemption. The brief of the taxing authorities in the companion case, First Unitarian Church of Los Angeles v. County of Los Angeles, 78 S.Ct. 1350, states, 'Section 32 is an evidentiary provision. Its purpose and effect are to afford to the Assessor information to guide his compliance with and his enforcement of the Constitution's prohibition * * *.' (Emphasis supplied.)
It is also suggested that this Court construe the California legislation contrary to the clearly expressed construction of the California Supreme Court and thus avoid decision of the question of procedural due process. But this construction would not avoid decision of constitutional questions but rather would create the necessity for decision of the broader constitutional question of the validity of s 19 of Art. XX. A more fundamental objection to the suggestion, of course, is that it does violence to the basic constitutional principle that the construction of state laws is the exclusive responsibility of the state courts.

[11][12] It is of course within the power of the

State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion, 'unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' Snyder v. Commonwealth of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674. '(O)f course the legislature may go a good way in raising * * * (presumptions) or in changing the burden of proof, but there are limits. * * * (I)t is not within the province of a legislature ***524** to declare an individual guilty or presumptively guilty of a crime.' McFarland v. American Sugar Refining Co., 241 U.S. 79, 86, 36 S.Ct. 498, 501, 60 L.Ed. 899. The legislature cannot 'place upon all defendants in criminal cases the burden of going forward with the evidence * * *. (It cannot) validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt. This is not permissible.' Tot v. United States, 319 U.S. 463, 469, 63 S.Ct. 1241, 1246, 87 L.Ed. 1519. Of course, the burden of going forward with the evidence at some stages of a criminal trial may be placed on the defendant, but only after the State has 'proved enough to make it just for the defendant to be required to repel what has been proved with excuse or explanation, or at least that upon a balancing of convenience or of the opportunities for knowledge the shifting of the burden will be found to be an aid to the accuser without subjecting the accused to hardship or oppression.' Morrison v. People of State of California, 291 U.S. 82, 88--89, 54 S.Ct. 281, 284, 78 L.Ed. 664. In civil cases too this Court has struck down state statutes unfairly shifting the burden of proof. Western & A.R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884; cf. Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 43, 31 S.Ct. 136, 138, 55 L.Ed. 78.

[13][14][15] It is true that due process may not always compel the full formalities of a criminal prosecution before criminal advocacy can be suppressed or deterred, but it is clear that the State which attempts to do so must provide procedures amply adequate to safeguard against invasion of speech which the Constitution protects. Kingsley Books, Inc., v. Brown, supra. It is, of course, familiar practice in the administration of a tax program for the taxpayer to carry the burden of introducing evidence to rebut the determination of the collector. Phillips v. Dime Trust Co., 284 U.S. 160, 167, 52 S.Ct. 46, 47, 76 L.Ed. 220; Brown v. Helvering, 291 U.S. 193, 199, 54 S.Ct. 356, 359, 78 L.Ed. 725. But while the fairness of placing the burden of proof on the taxpayer in most circumstances is ***525** recognized, this Court has not hesitated to declare a summary tax-collection procedure a violation of due process when the purported tax was shown to be in reality a penalty for a crime. Lipke v. Lederer, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061; cf. Helwig v. United States, 188 U.S. 605, 23 S.Ct. 427, 47 L.Ed. 614. The underlying rationale of thse cases is that where a person is to suffer a penalty for a crime he is entitled to greater procedural safeguards than when only the amount of his tax liability is in issue. Similarly it does not follow that because only a tax liability is here involved, the ordinary tax assessment procedures are adequate when applied to penalize speech.

****1342** [16][17][18] It is true that in the present case the appellees purport to do no more than compute the amount of the taxpayer's liability in accordance with the usual procedures, but in fact they have undertaken to determine whether certain speech falls within a class which constitutionally may be curtailed. As cases decided in this Court have abundantly demonstrated, the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430; cf. Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356. The separation of legitimate from illegitimate speech calls for more sensitive tools than California has supplied. In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome. Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196; United States v. New York, N.H. & H.R. Co., 355 U.S. 253, 78 S.Ct. 212, 2 L.Ed.2d 247; Sampson v. Channell, 1 Cir., 110 F.2d 754, 758, 128 A.L.R. 394. There is always in litigation a margin of error, representing error in factfinding, which both parties must take into account. Where one party has at stake an interest of transcending value--as a criminal defendant his liberty--this margin of error is reduced as to him by the process of placing on the other party the burden of

producing a sufficiency of proof in the first *526 instance, and of persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of producing the evidence and convincing the factfinder of his guilt. Tot v. United States, supra. Where the transcendent value of speech is involved, due process certainly requires in the circumstances of this case that the State bear the burden of persuasion to show that the appellants engaged in criminal speech. Cf. Kingsley Books, Inc., v. Brown, supra.

[19] The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding--inherent in all litigation--will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. Dennis v. United States, supra, provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free. 'It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions.' Bailey v. State of Alabama, 219 U.S. 219, 239, 31 S.Ct. 145, 151, 55 L.Ed. 191.

*527 [20] The appellees, in controverting this position, rely on cases in which this Court has sustained the validity of loyalty oaths required of public employees, Garner v. Board of Public Works, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317, candidates for public office, Gerende v. Board of Supervisors, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745, and officers of labor unions, American Communications **1343 Ass'n, C.I.O. v. Douds, supra. In these cases, however, there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. The purpose of the legislation sustained in the Douds case, the Court found, was to minimize the danger of political strikes disruptive of interstate commerce by discouraging labor unions from electing Communist Party members to union office. While the Court recognized that the necessary effect of the legislation was to discourage the exercise of rights protected by the First Amendment, this consequence was said to be only indirect. The congressional purpose was to achieve an objective other than restraint on speech. Only the method of achieving this end touched on protected rights and that only tangentially. The evil at which Congress has attempted to strike in that case was thought sufficiently grave to justify limited infringement of political rights. Similar considerations governed the other cases. Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public. The present legislation, however, can have no such justification. It purports to deal directly with speech and the expression of political ideas. 'Encouragement to loyalty to our institutions * * * (is a doctrine) which the state has plainly promulgated and intends to foster.' *528 48 Cal. 2d at page 439, 311 P.2d at page 520. The State argues that veterans as a class occupy a position of special trust and influence in the community, and therefore any veteran who engages in the proscribed advocacy constitutes a special danger to the State. But while a union official or public employee may be deprived of his position and thereby removed from the place of special danger, the State is powerless to erase the service which the veteran has rendered his country; though he be denied a tax exemption, he remains a veteran. The State, consequently, can act against the veteran only as it can act against any other citizen, by imposing penalties to deter the unlawful conduct.

Moreover, the oaths required in those cases performed a very different function from the declaration in issue here. In the earlier cases it appears that the loyalty oath, once signed, became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the officeholder the burden of proving his right to retain his position. [FN8] The signer, of course, could be prosecuted for perjury, but only in accordance with the strict procedural safeguards surrounding such criminal prosecutions. In the present case, however, it is clear that the declaration may be accepted or rejected on the basis of incompetent information or no information at all. It is only a step in a process throughout which the taxpayer must bear the burden of proof.

> FN8. Significantly, the New York statute which this Court upheld in Adler v. Board of Education, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517, provided that public-school teachers could be dismissed on security grounds only after a hearing at which the official pressing the charges sustained his burden of proof by a fair preponderance of the evidence.

[21][22][23] Believing that the principles of those cases have no application here, we hold that when the constitutional ***529** right to speak is sought to be deterred by a State's general taxing program due process demands that the speech he unencumbered until the State comes forward with sufficient proof to justify ****1344** its inhibition. The State clearly has no such compelling interest at stake as to justify a short-cut procedure which must inevitably result in suppressing protected speech. Accordingly, though the validity of s 19 of Art. XX of the State Constitution be conceded arguendo, its enforcement through procedures which place the burdens of proof and persuasion on the taxpayer is a violation of due process. It follows from this that appellants could not be required to execute the declaration as a condition for obtaining a tax exemption or as a condition for the assessor proceeding further in determining whether they were entitled to such an exemption. Since the entire statutory procedure, by placing the burden of proof on the claimants, violated the requirements of due process, appellants were not obliged to take the first step in such a procedure.

The judgments are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Mr. Justice BURTON concurs in the result.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

***532** Mr. Justice DOUGLAS, with whom Mr. Justice BLACK agrees, concurring.

While I substantially agree with the opinion of the Court, I will state my reasons more fully and more explicitly.

I. The State by the device of the loyalty oath places the burden of proving loyalty on the citizen. That procedural ***533** device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established. This technique is an ancient one that was denounced in an early period of our history.

Alexander Hamilton, writing in 1784 under the name Phocion, said:

> '* * * let it be supposed that instead of the mode of indictment and trial by jury, the Legislature was to declare, that every citizen who did not swear he had never adhered to the King of Great Britain, should incur all the penalties which our treason laws prescribe. Would this not be * * * a direct infringement of the Constitution? * * * it is substituting a new and arbitrary mode of prosecution to that ancient and highly esteemed one, recognized by the laws and the Constitution of the State,--I mean the trial by jury.' 4 The Works of Alexander Hamilton (Fed. ed. 1904) 269--270.

Hamilton compared that hypothetical law to an actual one passed by New York on March 27, 1778, whereby a person who had served the King of England in enumerated ways was declared 'to be utterly disabled disqualified and incapacitated to vote either by ballot or viva voce at any election' in

New York. N.Y.Laws 1777--1784, 35. An oath was required [FN1] in enforcement of that law. [FN2]

FN1. The oath was prescribed by the Council in charge of the Southern District of New York. The Council, authorized by the Act of October 23, 1779, was composed of the Governor, President of the Senate, Chancellor, Supreme Court judges, Senators, Assemblymen, Secretary of State, Attorney General, and County Court judges. The Council was to assume authority 'whenever the enemy shall abandon or be dispossessed of the same, and until the legislature can be convened,' N.Y.Laws 1777--1784, 192. The Council governed from November 25, 1783, to February 5, 1784. See Barck, New York City 1776--1783 (1931), 220--221. Among the powers of the Council was control of elections.

The election oath prescribed by the Council read as follows:

'I ..... do solemnly, without any mental Reservation or Equivocation whatsoever, swear and declare, and call God to witness (or if of the People called Quakers, affirm) that I renounce and abjure all Allegiance to the King of Great-Britain; and that I will bear true Faith and Allegiance to the State of New-York, as a Free and Independent State, and that I will in all Things, to the best of my Knowledge and Ability, do my Duty as a good and faithful Subject of the said State ought to do. So help me God.' Independent Gazette, Dec. 13, 1783.

The Council further provided:

'That if any Person presenting himself to give his Vote, shall be suspected of, or charged with having committed any of the Offences above specified, it shall be Lawful for the Inspectors, or Superintendents (as the Case may be) to inquire into and determine the Fact whereof such Person shall be suspected, or wherewith he shall be charged, as the Cause of Disqualification, on the Oath of one or more Witnesses, or on the Oath of the Party so suspected or charged, at their Discretion; and if such Fact shall, in the Judgement of the Inspectors or Superintendents, be established, it shall be lawful for them, and they are hereby required, to reject the Vote of such Person at such Election.' Independent Gazette, Dec. 13, 1783.

FN2. Other loyalty oaths appeared during this early period. Suspected persons were required to take a loyalty oath. N.Y.Laws 1777--1784, 87. The same was required of lawyers. Id., at 155, 420. And see Flick, Loyalism in New York During the American Revolution, 14 Studies in History, Economics and Public Law (Columbia Univ. 1901) 9 (passim).

****1345 *534** Hamilton called this 'a subversion of one great principle of social security: to wit, that every man shall be presumed innocent until he is proved guilty.' 4 The Works of Alexander Hamilton (Fed. ed. 1904) 269. He went on to say 'This was to invert the order of things; and, instead of obliging the State to prove the guilt in order to inflict the penalty, it was to oblige the citizen to establish his own innocence to avoid the penalty. It was to excite scruples in the honest and conscientious, and to hold out a bribe to perjury.' Ibid.

***535** If the aim is to apprehend those who have lifted a hand against the Government, the procedure is unconstitutional.

If one conspires to overthrow the government, he commits a crime. To make him swear he is innocent to avoid the consequences of a law is to put on him the burden of proving his innocence. That method does not square with our standards of procedural due process, as the opinion of the Court points out.

The Court in Cummings v. State of Missouri, 4 Wall. 277, 328, 18 L.Ed. 356, denounced another expurgatory oath that had some of the vices of the present one.

'The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence

can be shown only in one way--by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.'

II. If the aim of the law is not to apprehend criminals but to penalize advocacy, it likewise must fall. Since the time that Alexander Hamilton wrote concerning these oaths, the Bill of Rights was adopted; and then much later came the Fourteenth Amendment. As a result of the latter a rather broad range of liberties was newly guaranteed to the citizen against state action. Included were those contained in the First Amendment--the right to speak freely, the right to believe what one chooses, the right of conscience. Stromberg v. People of State of California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117; Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105, 63 S.Ct. 891, 87 L.Ed. 1292; ****1346**Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302. Today what one thinks or believes, what one utters and says have the full protection ***536** of the First Amendment. It is only his actions that government may examine and penalize. When we allow government to probe his beliefs and withhold from him some of the privileges of citizenship because of what he thinks, we do indeed 'invert the order of things,' to use Hamilton's phrase. All public officials--state and federal-- must take an oath to support the Constitution by the express command of Article VI of the Constitution. And see Gerende v. Board of Sup'rs of Elections, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745. But otherwise the domains of conscience and belief have been set aside and protected from government intrusion. West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628. What a man thinks is of no concern to government. 'The First Amendment gives freedom of mind the same security as freedom of conscience.' Thomas v. Collins, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430. Advocacy and belief go hand in hand. For there can be no true freedom of mind if thoughts are secure only when they are pent up.

In Murdock v. Commonwealth of Pennsylvania, supra, we stated, 'Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful.' 319 U.S. at page 116, 63 S.Ct. at page 876. If the Government may not impose a tax upon the expression of ideas in order to discourage them, it may not achieve the same end by reducing the individual who expresses his views to second-class citizenship by withholding tax benefits granted others. When government denies a tax exemption because of the citizen's belief, it penalizes that belief. That is different only in form, not substance, from the 'taxes on knowledge' which have had a notorious history in the English-speaking world. See Grosjean v. American Press Co., 297 U.S. 233, 246--247, 56 S.Ct. 444, 447-- 448, 80 L.Ed. 660.

We deal here with a type of advocacy which, to say the least, lies close to the 'constitutional danger zone.' Yates v. United States, 354 U.S. 298, 319, 77 S.Ct. 1064, 1077, 1 L.Ed.2d 1356. Advocacy which is in no way brigaded with action should always be protected ***537** by the First Amendment. That protection should extend even to the ideas we despise. As Mr. Justice Holmes wrote in dissent in Gitlow v. People of State of New York, 268 U.S. 652, 673, 45 S.Ct. 625, 632, 69 L.Ed. 1138, 'If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.' It is time for government-- state or federal--to become concerned with the citizen's advocacy when his ideas and beliefs move into the realm of action.

The California oath is not related to unlawful action. To get the tax exemption the taxpayer must swear he 'does not advocate the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means nor advocate the support of a foreign government against the United States in event of hostilities.' [FN3] The Court construes the opinion of the California Supreme Court as applying the same test of illegal advocacy as was sustained against constitutional challenge in Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137. That case held that advocacy of the overthrow of government by force and violence was not enough, that incitement to action, as well as clear and present danger, were also essential ingredients. Id., 341 U.S. at pages 512, 509--510, 71 S.Ct. at pages 867, 868. As Yates v. United States, supra, makes clear, there is still a clear constitutional ****1347** line between advocacy of abstract doctrine and

advocacy of action. The California Supreme Court said, to be sure, that the oath in question 'is concerned' with that kind of advocacy. [FN4] But it nowhere says that oath is limited to that kind of advocacy. It seemed to think that advocacy was itself action for it said, 'What one may merely believe is not prohibited. ***538** It is only advocates of the subversive doctrines who are affected. Advocacy constitutes action and the instigation of action, not mere belief or opinion.' [FN5]

FN3. Calif.Rev. & Tax Code s 32; and see Calif.Const., Art XX, s 19.

FN4. 48 Cal.2d 419, 440, 311 P.2d 508, 520.

FN5. 48 Cal.2d at page 434, 311 P.2d at page 517.

However the California opinion may be read, these judgments should fall. If the construction of the oath is the one I prefer, then the Supreme Court of California has obliterated the line between advocacy of abstract doctrine and advocacy of action. If the California oath has been limited by judicial construction to the type of advocacy condemned in Dennis, it still should fall. My disagreement with that decision has not abated. No conspiracy to overthrow the Government was involved. Speech and speech alone was the offense. I repeat that thought and speech go hand in hand. There is no real freedom of thought if ideas must be suppressed. There can be no freedom of the mind unless ideas can be uttered.

I know of no power that enables any government under our Constitution to become the monitor of thought, as this statute would have it become.

Mr. Justice CLARK, dissenting.

The decision of the Court turns on a construction of California law which regards the filing of the California tax oath as introductory, not conclusive, in nature. Hence, once the oath is filed, it may be 'accepted or rejected on the basis of incompetent information or no information at all.' And the filing is 'only a step in a process throughout which the taxpayer must bear the burden of proof.'

No California case, least of all the present one, compels such an understanding of s 32 of the California Revenue and Taxation Code. Neither appellant here filed the required oath, so the procedural skeleton of this case is not enlightening. If anything, the opinion of the state ***539** court indicates that the filing, whether the oath be true or false, would conclusively establish the taxpayer's eligibility for an exemption. Thus, in explaining the effect of s 32, the California court stated:

'For the obvious purpose, among others, of avoiding litigation, the Legislature, throughout the years has sought to relieve the assessor of the burden, on his own initiative and at the public expense, of ascertaining the facts with reference to tax exemption claimants. In addition to the means heretofore and otherwise provided by law the Legislature, with special reference to the implementation of section 19 of article XX, has enacted section 32. That section provides a direct, time saving and relatively inexpensive method of ascertaining the facts.' (Emphasis added.) 48 Cal.2d 419, 432, 311 P. 508, 515--516.

Moreover, the recourse of the State in the event a false oath is filed is expressly provided by s 32: 'Any person or organization who makes such declaration knowing it to be false is guilty of a felony.' The majority relies heavily on the duty of the assessor to '(investigate) the facts underlying all tax liabilities,' as well as his subpoena power incident thereto under s 454 of the California Tax Code. But the California court adverts to those matters only under a hypothetical state of facts, namely, in the absence of the aid provided by s 32. 48 Cal.2d, at pages 430--432, 311 P.2d at page 515. The essential point is that, whatever the assessor's duty, s 32 provides for its discharge on the basis of the declarations alone.

****1348** On the other hand, if it be thought that the Supreme Court of California is ambiguous on this matter, then it is well established that our duty is to so construe the state oath as to avoid conflict with constitutional guarantees of due process. Garner v. Board of Public Works, 1951, 341 U.S. 716, 723--724, 71 S.Ct. 909, 914--915, 95 L.Ed. 1317; ***540**Gerende v. Board of Supervisors of Elections, 1951, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745. Two years ago we construed filing of the non-Communist affidavit required by s 9(h) of the National Labor Relations Act, 29 U.S.C.A. s 159(h)

, as being conclusive in character, holding that the criminal sanction provided in that section was the exclusive remedy for the filing of a false affidavit. Leedom v. International Union of Mine, Mill & Smelter Workers, 1956, 352 U.S. 145, 77 S.Ct. 154, 1 L.Ed.2d 201. That Act bars issuance of a complaint or conducting an investigation upon the application of a union unless the prescribed non-Communist affidavit is filed by each officer of the union. Article XX, s 19, of the California Constitution expressly prohibits a tax exemption to any person or organization that advocates violent overthrow of either the California or the United States Governments, or advocates the support of a foreign government against the United States in the event of hostilities, and provides for legislative implementation thereof. By s 32 the California Legislature has required only the filing of the affidavit. The terms of s 9(h) of the National Labor Relations Act and s 32 of the California Tax Code, therefore, establish identical procedures. That identity points up the inappropriateness of the Court's construction of s 32.

Even if the Court's interpretation of California law is correct, I cannot agree that due process requires California to bear the burden of proof under the circumstances of this case. This is not a criminal proceeding. Neither fine nor imprisonment is involved. So far as Art. XX, s 19, of the California Constitution and s 32 of the California Tax Code are concerned, appellants are free to speak as they wish, to advocate what they will. If they advocate the violent and forceful overthrow of the California Government, California will take no action against them under the tax provisions here in question. But it ***541** will refuse to take any action for them, in the sense of extending to them the legislative largesse that is inherent in the granting of any tax exemption or deduction. In the view of the California court, 'An exemption from taxation is the exception and the unusual. * * * It is a bounty or gratuity on the part of the sovereign and when once granted may be withdrawn.' 48 Cal.2d, at page 426, 311 P.2d at page 512. The power of the sovereign to attach conditions to its bounty is firmly established under the Due Process Clause. Cf. Ivanhoe Irrigation District v. McCracken, 1958, 357 U.S. 275, 78 S.Ct. 1174. Traditionally, the burden of qualifying rests upon the one seeking the grace of the State. The majority suggests that traditional procedures are inadequate when 'a person is to suffer a penalty for a crime.' But California's action here, declining to extend the grace of the State to appellants, can in no proper sense be regarded as a 'penalty.' The case cited by the majority, Lipke v. Lederer, 1922, 259 U.S. 557, 42 S.Ct. 549, 66 L.Ed. 1061, involves an altogether different matter, imposition of a special tax upon one who engaged in certain illegal conduct, by a statute that described the levy as a 'tax or penalty.' (Emphasis added.) 259 U.S. at page 561, 42 S.Ct. at page 550.

The majority, however, would require that California bear the burden of proof under the circumstances of this case because 'the transcendent value of speech is involved.' This is a wholly novel doctrine, unsupported by any precedent, and so far as I can see, inapposite to several other decisions of this Court upholding the application of similar oaths to municipal employees, ****1349**Garner v. Board of Public Works, 1951, 341 U.S. 716, 71 S.Ct. 909, 95 L.Ed. 1317; public school teachers, Adler v. Board of Education, 1952, 342 U.S. 485, 72 S.Ct. 380, 96 L.Ed. 517; candidates for public office, Gerende v. Board of Supervisors, 1951, 341 U.S. 56, 71 S.Ct. 565, 95 L.Ed. 745; and labor union officials, ***542** American Communications Ass'n v. Douds, 1950, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925. See also Davis v. Beason, 1890, 133 U.S. 333, 10 S.Ct. 299, 33 L.Ed. 637, as to voters in territorial elections. All of those decisions, by virtue of the oath involved, put the burden on the individual to come forward and disavow activity involving 'the transcendent value of speech.' The majority attempts to distinguish them on the basis of their involving a greater state interest in justification of restricting speech, and also on the ground that the oaths there involved were conclusive in nature. The first distinction, however, seems pertinent only to the validity of an oath requirement in the first place, not to burden of proof under such a requirement. The second distinction, which arguendo I accept as true at this point, seems exceedingly flimsy, since even an oath that is conclusive in nature forces the applicant to the burden of coming forward and making the requisite declaration. So far as impact on freedom of speech is concerned, the further burden of proving the declarations true appears close to being de minimus.

The majority assumes, without deciding, that

California may deny a tax exemption to those in the proscribed class. I think it perfectly clear that the State may do so, since only that speech is affected which is criminally punishable under the Federal Smith Act, 18 U.S.C. s 2385, 18 U.S.C.A. s 2385, or the California Criminal Syndicalism Act, Cal.Stat., 1919, c. 188. And California has agreed that its interpretation of criminal speech under those Acts shall be in conformity with the decisions of this Court, e.g., Yates v. United States, 1957, 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356; Dennis v. United States, 1951, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137; Whitney v. People of State of California, 1927, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095. The interest of the State that justifies restriction of speech by imposition of criminal sanctions surely justifies the far less severe measure of denying a tax exemption, provided the lesser sanction bears reasonable relation to the evil at which the State ***543** aims. Cf. American Communications Ass'n v. Douds, supra. The general aim of the constitutional and legislative provisions in question is to restrict advocacy of violent or forceful overthrow of State or National Government; the particular aim is to avoid state subsidization of such advocacy by refusing the State's bounty to those who are so engaged. The latter has been denominated the 'primary purpose' by the California Supreme Court. 48 Cal.2d, at page 428, 311 P.2d at page 513. In view of that, reasonable relation is evident on the face of the matter.

Refusal of the taxing sovereign's grace in order to avoid subsidizing or encouraging activity contrary to the sovereign's policy is an accepted practice. We have here a parallel situation to federal refusal to regard as 'necessary and ordinary,' and hence deductible under the federal income tax, those expenses deduction of which would frustrate sharply defined state policies. See Tank Truck Rentals, Inc., v. Commissioner, 1958, 356 U.S. 30, 78 S.Ct. 507, 2 L.Ed.2d 562.

If the State's requirement of an oath in implementing denial of this exemption be thought to make an inroad upon speech over and above that caused by denial of the exemption, or even by criminal punishment of the proscribed speech, I find California's interest still sufficient to justify the State's action. The restriction must be considered in the context in which the oath is set--appeal to the largesse of the State. The interest of the State, as before pointed out, is dual in nature, but its primary thrust is summed up in an understandable desire to insure that those who benefit by tax exemption do not bite the hand that gives it.

****1350** Appellants raise other issues--pre-emption of security legislation under Commonwealth of Pennsylvania v. Nelson, 1956, 350 U.S. 497, 76 S.Ct. 477, 100 L.Ed. 640, and denial of equal protection because the oath is not required for all types of tax exemptions--which the majority does not pass upon. I treat of them only so far ***544** as to say that I think neither has merit, substantially for the reasons stated in the opinion of the Supreme Court of California.

If my interpretation of s 32 is correct, I assume that California will afford appellants another opportunity to take the oath, this time knowing that its filing will have conclusive effect. For the reasons stated above, I would affirm the judgment.

For concurring opinion of Mr. Justice BLACK with whom Mr. Justice DOUGLAS joins, see 357 U.S. 513, 78 S.Ct. 1352.

357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460

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77 S.Ct. 200
352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178
(Cite as: 352 U.S. 112, 77 S.Ct. 200)

Supreme Court of the United States

Lee WALKER, Appellant,
v.
CITY OF HUTCHINSON, Reno County, KANSAS, a Municipal Corporation, et al.

No. 13.

Argued Oct. 15 and 16, 1956.
Decided Dec. 10, 1956.

Action by landowner to enjoin city and its agents from entering or trespassing on his property, and for such other and further relief as the court deemed equitable. The District Court, Reno County, Kansas, denied relief and landowner appealed. The Supreme Court of Kansas, 178 Kan. 263, 284 P.2d 1073, affirmed the judgment and landowner appealed. The Supreme Court, Mr. Justice Black, held that where landowner was a resident of Kansas and his name was known to city and was on its official records, newspaper publication alone of notice of condemnation proceedings against his property did not measure up to the quality of notice the due process clause of the Fourteenth Amendment required as a prerequisite to proceedings to fix compensation for condemnation of his property.

Reversed and remanded.

Mr. Justice Burton and Mr. Justice Frankfurter, dissented.

West Headnotes

[1] Constitutional Law ⇐281
92k281 Most Cited Cases
Due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation, and the right to such a hearing is meaningless without notice. U.S.C.A.Const. Amend. 14.

[2] Constitutional Law ⇐309(1)
92k309(1) Most Cited Cases
If feasible, adequate notice under the due process clause of the Constitution must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law ⇐281
92k281 Most Cited Cases
Where landowner was a resident of Kansas and his name was known to city and was on its official records, newspaper publication alone of notice of condemnation proceedings against his property did not measure up to the quality of notice the due process clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation for condemnation of his property. G.S.Kan.1949, 26-201 et seq., 26-201, 26-202, 26-205; G.S.Kan.1955 Supp. 26- 202; U.S.C.A.Const. Amend. 14.

[4] Evidence ⇐20(1)
157k20(1) Most Cited Cases
It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property.

[5] Eminent Domain ⇐219
148k219 Most Cited Cases
There is nothing peculiar about litigation between the government and its citizens that should deprive those citizens of a right to be heard in a condemnation proceeding against their property.

****200 *112** Mr. Herbert Monte Levy, New York City, for appellant.

Mr. Fred C. Littooy, Hutchinson, Kan., for appellees.

Opinion of the Court by Mr. Justice BLACK announced by Mr. Justice DOUGLAS.

The appellant Lee Walker owned certain land in the City of Hutchinson, Kansas. In 1954 the City filed an action in the District Court of Reno County, Kansas, to condemn part of his property in order to open, widen, and ***113** extend one of the City's streets. The proceeding was instituted under the authority of Article 2, Chapter 26 of the General

Statutes of Kansas, 1949. Pursuant to ****201** s 26--201 of that statute [FN1] the court appointed three commissioners to determine compensation for the property taken and for any other damage suffered. These commissioners were required by s 26-- 202 to give landowners at least ten days' notice of the time and place of their proceedings. Such notice could be given either 'in writing * * * or by one publication in the official city paper * * *.' [FN2] The appellant here was not given notice ***114** in writing but publication was made in the official city paper of Hutchinson. The commissioners fixed his damages at $725, and pursuant to statute, this amount was deposited with the city treasurer for the benefit of appellant. Section 26--205 authorized an appeal from the award of the commissioners if taken within 30 days after the filing of their report. Appellant took no appeal within the prescribed period. Some time later, however, he brought the present equitable action in the Kansas District Court. His petition alleged that he had never been notified of the condemnation proceedings and knew nothing about them until after the time for appeal had passed. He charged that the newspaper publication authorized by the statute was not sufficient notice to satisfy the Fourteenth Amendment's due process requirements. He asked the court to enjoin the City of Hutchinson and its agents from entering or trespassing on the property 'and for such other and further relief as to this Court seem(s) just and equitable.' [FN3] After a ****202** hearing, the Kansas trial ***115** court denied relief, holding that the newspaper publication provided for by s 26--202 was sufficient notice of the Commissioners' proceedings to meet the requirements of the Due Process Clause. Agreeing with the trial court, the State Supreme Court affirmed. 178 Kan. 263, 284 P.2d 1073. The case is properly here on appeal under 28 U.S.C. s 1257(2), 28 U.S.C.A. s 1257(2). The only question we find it necessary to decide is whether, under circumstances of this kind, newspaper publication alone measures up to the quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases.

FN1. Section 26--201 reads in part as follows:
'Private property for city purposes; survey; ordinance fixing benefit district; application to district court; commissioners. Whenever it shall be deemed necessary by any governing body of any city to appropriate private property for the opening, widening, or extending any street or alley, * * * the governing body shall cause a survey and description of the land or easement so required to be made by some competent engineer and file with the city clerk. And thereupon the governing body shall make an order setting forth such condemnation and for what purpose the same is to be used. * * * The governing body, as soon as practicable after making the order declaring the appropriation of such land necessary * * * shall present a written application to the judge of the district court of the county in which said land is situated describing the land sought to be taken and setting forth the land necessary for the use of the city and * * * praying for the appointment of three commissioners to make an appraisement and assessment of the damages therefor.'

FN2. Section 26--202 read in part as follows:
'Notice to property owners or lienholders of record; appraisement and assessment of damages; reports. The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations. For the payment of such value and damages the commissioners shall assess against the city the amount of the benefit to the public generally and the remainder of such damages against the property within the benefit district which shall in the opinion of the appraisers be especially benefited by the proposed improvement. The said commissioners

may adjourn as often and for such length of time as may be deemed convenient, and may, during any adjournment, perfect or correct all errors or omissions in the giving of notice by serving new notices or making new publication, citing corporations or individual property owners who have not been notified or to whom defective notice or insufficient notice has been given, and notice of any adjourned meeting shall be as effective as notice of the first meeting of the commissioners * * *.'

FN3. Although the relief prayed for was an injunction against the taking, the Supreme Court of Kansas evidently construed the pleadings as adequately raising the question whether notice was sufficient to assure the constitutionality of the compensation procedure; in its opinion it passed only on s 26--202, dealing with the latter problem. Since Kansas requires a showing of actual damage for standing to maintain an equity suit, McKeever v. Buker, 80 Kan. 201, 101 P. 991, and since the Kansas court took the complaint as alleging damage as a result of the compensation rather than the taking procedure, the pleading was evidently treated by the state court as alleging monetary damage resulting from the lack of notice in connection with compensation.

We accept this construction of the complaint by the Kansas court as sufficient allegation of damage. See Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135, where the adequacy of notice of compensation proceedings was passed on by this Court in an injunction suit like this one.

[1][2] It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. [FN4] We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized ***116** that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

FN4. We applied the same rule in Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724; see also City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333.

[3][4] Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value. [FN5]

FN5. Section 26--202 was amended in 1955, after this Court's decision in Mullane, to require that the city must give notice to property owners by mailing a copy of the newspaper notice to their last known resident, unless such residence could not be located by diligent inquiry. Kan.Gen.Stat.1949 (Supp.1955), s 26--202.

Nothing in our prior decisions requires a holding that newspaper publication under the circumstances here provides adequate notice of a hearing to determine compensation. The State relies primarily on Huling v. Kaw Valley Railway & Improvement Co., 130 U.S. 559, 9 S.Ct. 603, 32 L.Ed. 1045. We think that ****203** reliance is misplaced. Decided in 1889, that case upheld notice by publication in a condemnation proceeding on the ground that the

landowner was a non-resident. Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision. [FN6]

> FN6. The State also relies on North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491, 494, 69 L.Ed. 953, and Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135. But the holdings in those cases do not conflict with our holding here. The North Laramie case upheld c. 73, s 2, of the 1913 Laws of Wyoming, which provided for notice by publication in a newspaper and required that a copy of the newspaper must be sent to the landowner by registered mail. This Court's opinion stated at p. 282 that: 'The Supreme Court of Wyoming held that the procedure followed complied with the statutory requirements. By that determination we are bound.' In Bragg v. Weaver, supra, 251 U.S. at pages 61--62, 40 S.Ct. at page 64, this Court stated that the controlling Virginia statute provided that a landowner must be notified 'in writing and shall have thirty days after such notice within which to appeal. * * * It is apparent therefore that special care is taken to afford him ample opportunity to appeal and thereby to obtain a full hearing in the circuit court.'

***117** [5] There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. In too many instances notice by publication is no notice at all. It may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use.

For the foregoing reasons the judgment of the Supreme Court of Kansas is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER, dissenting.

Appellant contends that the provision of Kan.Gen.Stat.1949, s 26--202, allowing notice of the hearing on compensation to be given by one publication in the official city newspaper of itself violates the provision of the ***118** Fourteenth Amendment that no State shall 'deprive any person of life, liberty, or property, without due process of law * * *.' [FN1] The first issue that faces us, however, is to decide ****204** from the pleadings exactly what it is that we must decide in this case.

> FN1. The important statutory provisions of the Kansas condemnation procedure are set forth in the opinion of the Court, except for the provision in Kan.Gen.Stat.1949, s 26--204, that title to lands condemned for parkways or boulevards vests in the city immediately on publication of the resolution of condemnation and that the city's right to possession of condemned land vests when the report of the commissioners is filed in the office of the register of deeds. Kan.Gen.Stat.1949, s 26--204, is as follows:
> 'That the city clerk shall forthwith upon any report (of assessment commissioners) being filed in his office, prepare and deposit a copy thereof in the office of the treasurer of such city, and if there be deposited with the city treasurer, for the benefit of the owner or owners of such lands, the amount of the award, such treasurer shall thereupon certify such facts upon the copy of the report, and shall pay said awards to such persons as shall be respectively entitled thereto. * * * The title to lands condemned by any city for parks, parkways or boulevards shall vest in such city upon the publication of the resolution of the governing body condemning the same. Upon the recording of a copy of said report so certified in the office of the register of deeds of the county, the right to the possession of lands condemned shall

> vest in the city and the city shall have the right to forthwith take possession of, occupy, use and improve said lands for the purposes specified in the resolution appropriating the same.'

Once appellant discovered that his land had been condemned and that the time for appeal from the award of the commissioners had passed, various possible courses of action, followed separately or in combination and each raising different issues, were open to him. If he considered the award fair but still desired to keep his land, he could have contended that unconstitutionality of the notice for the hearing on compensation invalidated the taking. If he considered the award unfair, he could have *119 alleged in an appropriate action the unconstitutionality of the notice of the compensation hearing and the inadequacy of the compensation and sought to obtain fair compensation, see Ward v. Board of County Com'rs of Love County, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751, or to restrain entry onto his land until he received a hearing under Kan.Gen.Stat.1949, s 26--202, or, making a further allegation of the invalidity of the taking, to obtain a permanent injunction. At this stage, it is not relevant for me to imply any opinion on the merits of any of these possible courses of action.

On a fair reading of the complaint, appellant chose to pursue only the first course. The theory of his action, an attempt to restrain the city from trespassing on his land, is that he still has the right to possession. His petition for injunction based this right to possession solely on the allegation that the statutory notice was insufficient. Nowhere in his petition for an injunction does appellant make any factual allegation that the money deposited by the commissioners did not represent the fair value of his land and therefore left him out of pocket. Nowhere did he indicate that he wanted an injunction only until he received a hearing. The whole theory of his petition is that the property that was being taken without due process of law was his land, not its money value. [FN2]

> FN2. The complaint in its entirety is set forth in an Appendix at the end of this opinion, 352 U.S. 122, 77 S.Ct. 205.

In a memorandum filed after oral argument in this Court, appellant contends that the allegation of 'irreparable damage' is a sufficient allegation of monetary loss. He states: 'Of course, there could be no irreparable damage-- indeed there could be no damage at all--unless the amount of the award was less than the actual value of the property. Had this been an action for damages, then an allegation of the differences in value would logically *120 have been found in the petition. But it was an injunction proceeding.'

But an allegation of 'irreparable damage' is merely a legal conclusion, flowing from, and justified by, the necessary allegation of facts warranting injunctive relief. The usual factual assertion underlying such an allegation in a suit to restrain trespass is that the threatened continuous nature of the entry represents the 'irreparable damage.' Indeed, in his petition for injunction, appellant made the usual factual assertion, immediately preceding the prayer for relief:

> 'That at the present moment defendant City of Hutchinson, either itself, or by contractors employed by it, is, or is threatening to enter upon said real estate owned by the Plaintiff, and this for the purpose of building a highway across said real estate, all in utter and complete disregard of the rights of this Plaintiff.'

In view of this assertion and the absence of any other assertion with respect to **205 'irreparable damage,' appellant's claim that monetary loss is alleged is baseless.

If the Kansas Supreme Court had construed the pleading of 'irreparable damage' as implying a factual assertion that the award was less than the fair value of the land, I would accept that construction. See Saltonstall v. Saltonstall, 276 U.S. 260, 267--268, 48 S.Ct. 225, 226, 72 L.Ed. 565. But the Kansas Supreme Court did not construe the pleadings at all. It decided the case by upholding the constitutionality of the statute. Kansas has a right to make such an abstract determination for itself. This Court, however, can decide only 'Cases' or 'Controversies.' U.S.C.onst., Art. III, s 2. It has no constitutional power to render advisory opinions. To assume that the Kansas courts construed these pleadings sub silentio as alleging monetary loss is to excogitate. A much

more probable inference ***121** is that since the issue so controlling for this Court's jurisdiction was not raised in the pleadings, the Kansas court did not concern itself with it. In any event, lacking an explicit construction of the pleadings by the Kansas courts, we must construe the pleadings ourselves to decide what constitutional questions are here raised on the record as it comes to us. See Doremus v. Board of Education, 342 U.S. 429, 432, 72 S.Ct. 394, 396, 96 L.Ed. 475.

In my view, the only constitutional question raised by appellant is whether failure to give adequate notice of the hearing on compensation of itself invalidates the taking of his land, apart from any claim of loss. We have held many times that the State's interest in the expeditious handling of condemnation proceedings justifies the taking of land prior to payment, without violating the Due Process Clause, so long as adequate provision for payment of compensation is made. See, e.g., Bragg v. Weaver, 251 U.S. 57, 62, 40 S.Ct. 62, 64, 64 L.Ed. 135. Appellant must be able to show that the provisions for payment, as they operated in his case, were inadequate before he can attack the Kansas statutory scheme for compensation in condemnation cases. See Ashwander v. T.V.A., 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 and cases cited note 6 (Brandeis, J., concurring); cf. Smith v. State of Indiana, 191 U.S. 138, 148--149, 24 S.Ct. 51, 52, 48 L.Ed. 125. Since on the record before us the compensation was not alleged to be inadequate, the taking was valid and the judgment of the Kansas Supreme Court should be affirmed. At the very least, the case should be returned to the Kansas court so that we may have the benefit of its construction of the pleadings. See Honeyman v. Hanan, 300 U.S. 14, 57 S.Ct. 350, 81 L.Ed. 476.

But the Court, without explicitly construing the pleadings, passes upon the constitutionality of Kan.Gen.Stat.1949, s 26--202. Without intimating any opinion whether in the circumstances of this case appellant was denied the due process required in determining fair compensation for property taken under the power of ***122** eminent domain, I feel constrained to point out that the Court's decision does not hold the taking itself invalid and therefore does not require the Kansas court to grant an injunction so long as appellant's rights are protected.

APPENDIX.
'In District Court of Reno County, Kansas
'Amended Petition

'Comes now Lee Walker, the plaintiff herein, by his attorneys, Oswald & Mitchell, and for his cause of action against the City of Hutchinson, Reno County, Kansas, T. E. Chenoweth, City Manager, Robert G. King, Mayor and Members of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodward and C. E. Johnson, Members of the City Commission, all of the City ****206** of Hutchinson, Reno County, Kansas, respectfully states to the Court:

'2. That the Plaintiff is a resident of Hutchinson, Reno County, Kansas, and that his post office address is 907 East 11th Street, Hutchinson, Kansas; that he is a Negro; that he was born in Bargtown, Kentucky on the 15th day of October, 1875; and that he had, as a youth, an education equivalent to the Sixth Grade.

'3. That Defendant City of Hutchinson, Reno County, Kansas is a municipal corporation; that the above named individual Defendants are respectively T. E. Chenoweth, City Manager, Robert G. King, Mayor and a member of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodard and C. E. Johnson, members of the City Commission, all of the City of Hutchinson.

***123** '4. That on or about the 27th day of February, 1905, the Plaintiff acquired fee simple title through a Warranty Deed, duly executed by one Arthur Walker, which deed was duly recorded with the Register of Deeds of Reno County, Kansas, on the 28th day of February, 1905, in Book 85, Page 479, to the following described real estate, all situated in Reno County, Kansas:

'Lots thirty-seven (37), thirty-eight (38), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three (43), forty-four (44), forty-five (45), forty-six (46), forty-seven (47) and forty-eight (48), Block Five (5), Maple Grove Addition to the City of Hutchinson,

'and ever since that time, the Plaintiff has owned same, enjoyed quiet and peaceful possession thereof and likewise has had and enjoyed all the fruits of such ownership, and has paid, from time to time, all

assessments and taxes of every kind and nature legally assessed against said real estate; that he is therefore now the legal and equitable owner of said real estate.

'5. That on or about the 12th day of April, 1954, the defendant City of Hutchinson, through its duly elected or appointed, qualified and acting officials, filed an action in the District Court of Reno County, Kansas, entitled:

> 'In the matter of the application of the city of Hutchinson, Kansas, a municipal corporation, for the appointment of commissioners in the matter of the condemnation of property for the acquisition of right of way for the opening, widening and extending of portions of Eleventh Avenue, Harrison Street and Twenty-third Avenue in the city of Hutchison, Kansas,

'the same being docketed as Case No. 7867.

'6. That said action was for the purpose of taking from the Plaintiff and condemning certain portions of the above ***124** described real estate, as a by-pass, so to speak, for Hutchinson's Super-Sports Arena.

'7. That the Plaintiff has never been, at any time, notified in any manner that the City of Hutchinson coveted the bit of real estate as a by-pass to Hutchinson's Super-Sports Arena he has owned since 1905; nor has he ever been served with any summons, nor given any other personal notice of any kind whatsoever that said defendant City of Hutchinson had filed the aforesaid action for the purpose of taking a part of his said real estate.

'8. That the pretended right of defendant City of Hutchinson to the real estate above legally described, owned by the Plaintiff, rests upon the authority, so far as this Plaintiff and counsel have been able to ascertain, of G.S. 26--201 and 26--202, and Reno County, Kansas District Court Case No. 7867, more fully described in Paragraph 5 herein, brought thereunder, which statute or statutes are void and of no force and effect whatsoever, because same attempt ****207** to vest the power in certain municipalities to take property without due process of law.

'9. That the only notice to an owner of real property, which G.S. 26--201 and 26--202 requires is by publication, which is not sufficient notice under the above mentioned due process clauses of both Federal and State Constitutions.

'10. That the Plaintiff had no actual notice, and did not actually know, or have any reason to know that Defendants sought to condemn and take his land, until approximately the middle part of August, 1954; unless by a peculiar quirk of the imagination, it can be said that the single legal publication, published just once in The Hutchinson News-Herald, and that on the 14th day of April, 1954, gave him notice; that said single notice so published in the official newspaper was not sufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State Constitutions.

***125** '11. That at the present moment defendant City of Hutchinson, either itself, or by contractors employed by it, is, or is threatening to enter upon said real estate owned by the Plaintiff, and this for the purpose of building a highway across said real estate, all in utter and complete disregard of the rights of this Plaintiff.

'12. That the Plaintiff is entitled to an Order of this Court instanter, enjoining and restraining defendant City of Hutchinson from entering upon, or in any manner trespassing upon said real estate, for the reason, inter alia, that there is no other remedy, either at law or in equity, open to the Plaintiff; that if said defendant City of Hutchinson is not so restrained and enjoined, the Plaintiff will suffer irreparable damage by reason thereof.

'13. That the Plaintiff is advised that in some orders by Courts of competent jurisdiction, in the granting of a restraining order, or temporary injunction of this nature, the party seeking same, and obtaining same, is required to post certain indemnity or other type of bond or bonds; that the Plaintiff hereby respectfully and humbly advises the Court that by reason of his limited financial resources, he cannot post such a bond, and therefore asks, upon the above and foregoing statement of facts, that the Court does not make the giving of such a bond or bonds as a condition precedent to Plaintiff's obtaining a restraining order or temporary injunction at this time.

'14. That by reason of the above and foregoing facts, the Plaintiff is entitled to have, and desires to have a permanent injunction against defendant City of Hutchinson, restraining and enjoining it, and its servants, agents and all others in its employment, from entering or trespassing upon the Plaintiff's real estate, above described, or preventing him from otherwise enjoying the quiet and peaceful enjoyment thereof.

'Wherefore and by reason of the foregoing, the Plaintiff prays for an immediate Order of this Court restraining ***126** and enjoining defendant City of Hutchinson from entering or trespassing upon the Plaintiff's real estate, above described. and the Plaintiff further prays for a judgment of this Court permanently enjoining and restraining the City of Hutchinson from entering or trespassing upon Plaintiff's real estate, above described; and Plaintiff further prays for judgment for his costs herein, and for such other and further relief as to this Court seem just and equitable.'

Mr. Justice BURTON, dissenting.

If the issue in this case is the constitutionality of the statutory provision made for taking the property, its constitutionality seems clear. If, as I assume to be the case, the issue is the constitutional sufficiency of the statutory ****208** ten-day notice by publication of the hearing to assess the compensation for the land taken, I consider such a provision to be within the constitutional discretion of the lawmaking body of the State.

In weighing the 'due process' of condemnation procedure some reasonable balance must be struck between the needs of the public to acquire the property, and the opportunity for a hearing as to the compensation to be paid for the property. Just compensation is constitutionally necessary, but the length and kind of notice of the proceeding to determine such compensation is largely a matter of legislative discretion. The minimum notice required by this statute may seem to some to be inadequate or undesirably short, but it was satisfactory to the lawmakers of Kansas. It also has been upheld by the Supreme Court of Kansas and the United States Court of Appeals for the Tenth Circuit. To proscribe it as violative of the Federal Constitution fails to allow adequate scope to local legislative discretion. Accordingly, while not passing upon the desirability of the statutory requirement ***127** before us, I am not ready to hold that the Constitution of the United States prohibits the people of Kansas from choosing that standard. Particularly, I am not ready to throw a nationwide cloud of undertainty upon the validity of condemnation proceedings based on compliance with similar local statutes. Since 1889, it has been settled that notice by publication in condemnation proceedings to take and to fix the value to be paid for the land of a nonresident comports with due process. Huling v. Kaw Valley Ry. & Imp. Co., 130 U.S. 559, 9 S.Ct. 603, 32 L.Ed. 1045. See also, North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283--287, 45 S.Ct. 491, 494--495, 69 L.Ed. 953; Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135.

I agree with the court below and with the opinion of the Court of Appeals for the Tenth Circuit rendered in the comparable case of Collins v. City of Wichita, 225 F.2d 132, which came to our attention at the last term of Court and in which certiorari was denied on November 7, 1955, 350 U.S. 886, 76 S.Ct. 140. Therefore, I would affirm the judgment here.

352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178

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77 S.Ct. 200
352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178
(Cite as: 352 U.S. 112, 77 S.Ct. 200)

Supreme Court of the United States

Lee WALKER, Appellant,
v.
CITY OF HUTCHINSON, Reno County, KANSAS, a Municipal Corporation, et al.

No. 13.

Argued Oct. 15 and 16, 1956.
Decided Dec. 10, 1956.

Action by landowner to enjoin city and its agents from entering or trespassing on his property, and for such other and further relief as the court deemed equitable. The District Court, Reno County, Kansas, denied relief and landowner appealed. The Supreme Court of Kansas, 178 Kan. 263, 284 P.2d 1073, affirmed the judgment and landowner appealed. The Supreme Court, Mr. Justice Black, held that where landowner was a resident of Kansas and his name was known to city and was on its official records, newspaper publication alone of notice of condemnation proceedings against his property did not measure up to the quality of notice the due process clause of the Fourteenth Amendment required as a prerequisite to proceedings to fix compensation for condemnation of his property.

Reversed and remanded.

Mr. Justice Burton and Mr. Justice Frankfurter, dissented.

West Headnotes

[1] Constitutional Law ⇨281
92k281 Most Cited Cases
Due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation, and the right to such a hearing is meaningless without notice. U.S.C.A.Const. Amend. 14.

[2] Constitutional Law ⇨309(1)
92k309(1) Most Cited Cases
If feasible, adequate notice under the due process clause of the Constitution must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law ⇨281
92k281 Most Cited Cases
Where landowner was a resident of Kansas and his name was known to city and was on its official records, newspaper publication alone of notice of condemnation proceedings against his property did not measure up to the quality of notice the due process clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation for condemnation of his property. G.S.Kan.1949, 26-201 et seq., 26-201, 26-202, 26-205; G.S.Kan.1955 Supp. 26- 202; U.S.C.A.Const. Amend. 14.

[4] Evidence ⇨20(1)
157k20(1) Most Cited Cases
It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property.

[5] Eminent Domain ⇨219
148k219 Most Cited Cases
There is nothing peculiar about litigation between the government and its citizens that should deprive those citizens of a right to be heard in a condemnation proceeding against their property.

****200 *112** Mr. Herbert Monte Levy, New York City, for appellant.

Mr. Fred C. Littooy, Hutchinson, Kan., for appellees.

Opinion of the Court by Mr. Justice BLACK announced by Mr. Justice DOUGLAS.

The appellant Lee Walker owned certain land in the City of Hutchinson, Kansas. In 1954 the City filed an action in the District Court of Reno County, Kansas, to condemn part of his property in order to open, widen, and ***113** extend one of the City's streets. The proceeding was instituted under the authority of Article 2, Chapter 26 of the General

Statutes of Kansas, 1949. Pursuant to **201 s 26--201 of that statute [FN1] the court appointed three commissioners to determine compensation for the property taken and for any other damage suffered. These commissioners were required by s 26-- 202 to give landowners at least ten days' notice of the time and place of their proceedings. Such notice could be given either 'in writing * * * or by one publication in the official city paper * * *.' [FN2] The appellant here was not given notice *114 in writing but publication was made in the official city paper of Hutchinson. The commissioners fixed his damages at $725, and pursuant to statute, this amount was deposited with the city treasurer for the benefit of appellant. Section 26--205 authorized an appeal from the award of the commissioners if taken within 30 days after the filing of their report. Appellant took no appeal within the prescribed period. Some time later, however, he brought the present equitable action in the Kansas District Court. His petition alleged that he had never been notified of the condemnation proceedings and knew nothing about them until after the time for appeal had passed. He charged that the newspaper publication authorized by the statute was not sufficient notice to satisfy the Fourteenth Amendment's due process requirements. He asked the court to enjoin the City of Hutchinson and its agents from entering or trespassing on the property 'and for such other and further relief as to this Court seem(s) just and equitable.' [FN3] After a **202 hearing, the Kansas trial *115 court denied relief, holding that the newspaper publication provided for by s 26--202 was sufficient notice of the Commissioners' proceedings to meet the requirements of the Due Process Clause. Agreeing with the trial court, the State Supreme Court affirmed. 178 Kan. 263, 284 P.2d 1073. The case is properly here on appeal under 28 U.S.C. s 1257(2), 28 U.S.C.A. s 1257(2). The only question we find it necessary to decide is whether, under circumstances of this kind, newspaper publication alone measures up to the quality of notice the Due Process Clause of the Fourteenth Amendment requires as a prerequisite to proceedings to fix compensation in condemnation cases.

FN1. Section 26--201 reads in part as follows:
'Private property for city purposes; survey; ordinance fixing benefit district; application to district court; commissioners. Whenever it shall be deemed necessary by any governing body of any city to appropriate private property for the opening, widening, or extending any street or alley, * * * the governing body shall cause a survey and description of the land or easement so required to be made by some competent engineer and file with the city clerk. And thereupon the governing body shall make an order setting forth such condemnation and for what purpose the same is to be used. * * * The governing body, as soon as practicable after making the order declaring the appropriation of such land necessary * * * shall present a written application to the judge of the district court of the county in which said land is situated describing the land sought to be taken and setting forth the land necessary for the use of the city and * * * praying for the appointment of three commissioners to make an appraisement and assessment of the damages therefor.'

FN2. Section 26--202 read in part as follows:
'Notice to property owners or lienholders of record; appraisement and assessment of damages; reports. The commissioners appointed by the judge of the district court shall give any owner and any lienholder of record of the property sought to be taken at least ten days' notice in writing of the time and place when and where the damage will be assessed, or by one publication in the official city paper, and at the time fixed by such notice shall, upon actual view, appraise the value of the lands taken and assess the other damages done to the owners of such property, respectively, by such appropriations. For the payment of such value and damages the commissioners shall assess against the city the amount of the benefit to the public generally and the remainder of such damages against the property within the benefit district which shall in the opinion of the appraisers be especially benefited by the proposed improvement. The said commissioners

may adjourn as often and for such length of time as may be deemed convenient, and may, during any adjournment, perfect or correct all errors or omissions in the giving of notice by serving new notices or making new publication, citing corporations or individual property owners who have not been notified or to whom defective notice or insufficient notice has been given, and notice of any adjourned meeting shall be as effective as notice of the first meeting of the commissioners * * *.'

FN3. Although the relief prayed for was an injunction against the taking, the Supreme Court of Kansas evidently construed the pleadings as adequately raising the question whether notice was sufficient to assure the constitutionality of the compensation procedure; in its opinion it passed only on s 26--202, dealing with the latter problem. Since Kansas requires a showing of actual damage for standing to maintain an equity suit, McKeever v. Buker, 80 Kan. 201, 101 P. 991, and since the Kansas court took the complaint as alleging damage as a result of the compensation rather than the taking procedure, the pleading was evidently treated by the state court as alleging monetary damage resulting from the lack of notice in connection with compensation.

We accept this construction of the complaint by the Kansas court as sufficient allegation of damage. See Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135, where the adequacy of notice of compensation proceedings was passed on by this Court in an injunction suit like this one.

[1][2] It cannot be disputed that due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation. The right to a hearing is meaningless without notice. In Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, we gave thorough consideration to the problem of adequate notice under the Due Process Clause. That case establishes the rule that, if feasible, notice must be reasonably calculated to inform parties of proceedings which may directly and adversely affect their legally protected interests. [FN4] We there called attention to the impossibility of setting up a rigid formula as to the kind of notice that must be given; notice required will vary with circumstances and conditions. We recognized ***116** that in some cases it might not be reasonably possible to give personal notice, for example where people are missing or unknown.

FN4. We applied the same rule in Covey v. Town of Somers, 351 U.S. 141, 76 S.Ct. 724; see also City of New York v. New York, N.H. & H.R. Co., 344 U.S. 293, 73 S.Ct. 299, 97 L.Ed. 333.

[3][4] Measured by the principles stated in the Mullane case, we think that the notice by publication here falls short of the requirements of due process. It is common knowledge that mere newspaper publication rarely informs a landowner of proceedings against his property. In Mullane we pointed out many of the infirmities of such notice and emphasized the advantage of some kind of personal notice to interested parties. In the present case there seem to be no compelling or even persuasive reasons why such direct notice cannot be given. Appellant's name was known to the city and was on the official records. Even a letter would have apprised him that his property was about to be taken and that he must appear if he wanted to be heard as to its value. [FN5]

FN5. Section 26--202 was amended in 1955, after this Court's decision in Mullane, to require that the city must give notice to property owners by mailing a copy of the newspaper notice to their last known resident, unless such residence could not be located by diligent inquiry. Kan.Gen.Stat.1949 (Supp.1955), s 26--202.

Nothing in our prior decisions requires a holding that newspaper publication under the circumstances here provides adequate notice of a hearing to determine compensation. The State relies primarily on Huling v. Kaw Valley Railway & Improvement Co., 130 U.S. 559, 9 S.Ct. 603, 32 L.Ed. 1045. We think that ****203** reliance is misplaced. Decided in 1889, that case upheld notice by publication in a condemnation proceeding on the ground that the

landowner was a non-resident. Since appellant in this case is a resident of Kansas, we are not called upon to consider the extent to which Mullane may have undermined the reasoning of the Huling decision. [FN6]

FN6. The State also relies on North Laramie Land Co. v. Hoffman, 268 U.S. 276, 45 S.Ct. 491, 494, 69 L.Ed. 953, and Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135. But the holdings in those cases do not conflict with our holding here. The North Laramie case upheld c. 73, s 2, of the 1913 Laws of Wyoming, which provided for notice by publication in a newspaper and required that a copy of the newspaper must be sent to the landowner by registered mail. This Court's opinion stated at p. 282 that: 'The Supreme Court of Wyoming held that the procedure followed complied with the statutory requirements. By that determination we are bound.' In Bragg v. Weaver, supra, 251 U.S. at pages 61--62, 40 S.Ct. at page 64, this Court stated that the controlling Virginia statute provided that a landowner must be notified 'in writing and shall have thirty days after such notice within which to appeal. * * * It is apparent therefore that special care is taken to afford him ample opportunity to appeal and thereby to obtain a full hearing in the circuit court.'

***117** [5] There is nothing peculiar about litigation between the Government and its citizens that should deprive those citizens of a right to be heard. Nor is there any reason to suspect that it will interfere with the orderly condemnation of property to preserve effectively the citizen's rights to a hearing in connection with just compensation. In too many instances notice by publication is no notice at all. It may leave government authorities free to fix one-sidedly the amount that must be paid owners for their property taken for public use.

For the foregoing reasons the judgment of the Supreme Court of Kansas is reversed and the cause is remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Reversed and remanded.

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

Mr. Justice FRANKFURTER, dissenting.

Appellant contends that the provision of Kan.Gen.Stat.1949, s 26--202, allowing notice of the hearing on compensation to be given by one publication in the official city newspaper of itself violates the provision of the ***118** Fourteenth Amendment that no State shall 'deprive any person of life, liberty, or property, without due process of law * * *.' [FN1] The first issue that faces us, however, is to decide ****204** from the pleadings exactly what it is that we must decide in this case.

FN1. The important statutory provisions of the Kansas condemnation procedure are set forth in the opinion of the Court, except for the provision in Kan.Gen.Stat.1949, s 26--204, that title to lands condemned for parkways or boulevards vests in the city immediately on publication of the resolution of condemnation and that the city's right to possession of condemned land vests when the report of the commissioners is filed in the office of the register of deeds. Kan.Gen.Stat.1949, s 26--204, is as follows:
'That the city clerk shall forthwith upon any report (of assessment commissioners) being filed in his office, prepare and deposit a copy thereof in the office of the treasurer of such city, and if there be deposited with the city treasurer, for the benefit of the owner or owners of such lands, the amount of the award, such treasurer shall thereupon certify such facts upon the copy of the report, and shall pay said awards to such persons as shall be respectively entitled thereto. * * * The title to lands condemned by any city for parks, parkways or boulevards shall vest in such city upon the publication of the resolution of the governing body condemning the same. Upon the recording of a copy of said report so certified in the office of the register of deeds of the county, the right to the possession of lands condemned shall

> vest in the city and the city shall have the right to forthwith take possession of, occupy, use and improve said lands for the purposes specified in the resolution appropriating the same.'

Once appellant discovered that his land had been condemned and that the time for appeal from the award of the commissioners had passed, various possible courses of action, followed separately or in combination and each raising different issues, were open to him. If he considered the award fair but still desired to keep his land, he could have contended that unconstitutionality of the notice for the hearing on compensation invalidated the taking. If he considered the award unfair, he could have ***119** alleged in an appropriate action the unconstitutionality of the notice of the compensation hearing and the inadequacy of the compensation and sought to obtain fair compensation, see Ward v. Board of County Com'rs of Love County, 253 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751, or to restrain entry onto his land until he received a hearing under Kan.Gen.Stat.1949, s 26--202, or, making a further allegation of the invalidity of the taking, to obtain a permanent injunction. At this stage, it is not relevant for me to imply any opinion on the merits of any of these possible courses of action.

On a fair reading of the complaint, appellant chose to pursue only the first course. The theory of his action, an attempt to restrain the city from trespassing on his land, is that he still has the right to possession. His petition for injunction based this right to possession solely on the allegation that the statutory notice was insufficient. Nowhere in his petition for an injunction does appellant make any factual allegation that the money deposited by the commissioners did not represent the fair value of his land and therefore left him out of pocket. Nowhere did he indicate that he wanted an injunction only until he received a hearing. The whole theory of his petition is that the property that was being taken without due process of law was his land, not its money value. [FN2]

> FN2. The complaint in its entirety is set forth in an Appendix at the end of this opinion, 352 U.S. 122, 77 S.Ct. 205.

In a memorandum filed after oral argument in this Court, appellant contends that the allegation of 'irreparable damage' is a sufficient allegation of monetary loss. He states: 'Of course, there could be no irreparable damage-- indeed there could be no damage at all--unless the amount of the award was less than the actual value of the property. Had this been an action for damages, then an allegation of the differences in value would logically ***120** have been found in the petition. But it was an injunction proceeding.'

But an allegation of 'irreparable damage' is merely a legal conclusion, flowing from, and justified by, the necessary allegation of facts warranting injunctive relief. The usual factual assertion underlying such an allegation in a suit to restrain trespass is that the threatened continuous nature of the entry represents the 'irreparable damage.' Indeed, in his petition for injunction, appellant made the usual factual assertion, immediately preceding the prayer for relief:

> 'That at the present moment defendant City of Hutchinson, either itself, or by contractors employed by it, is, or is threatening to enter upon said real estate owned by the Plaintiff, and this for the purpose of building a highway across said real estate, all in utter and complete disregard of the rights of this Plaintiff.'

In view of this assertion and the absence of any other assertion with respect to ****205** 'irreparable damage,' appellant's claim that monetary loss is alleged is baseless.

If the Kansas Supreme Court had construed the pleading of 'irreparable damage' as implying a factual assertion that the award was less than the fair value of the land, I would accept that construction. See Saltonstall v. Saltonstall, 276 U.S. 260, 267--268, 48 S.Ct. 225, 226, 72 L.Ed. 565. But the Kansas Supreme Court did not construe the pleadings at all. It decided the case by upholding the constitutionality of the statute. Kansas has a right to make such an abstract determination for itself. This Court, however, can decide only 'Cases' or 'Controversies.' U.S.C.onst., Art. III, s 2. It has no constitutional power to render advisory opinions. To assume that the Kansas courts construed these pleadings sub silentio as alleging monetary loss is to excogitate. A much

more probable inference ***121** is that since the issue so controlling for this Court's jurisdiction was not raised in the pleadings, the Kansas court did not concern itself with it. In any event, lacking an explicit construction of the pleadings by the Kansas courts, we must construe the pleadings ourselves to decide what constitutional questions are here raised on the record as it comes to us. See Doremus v. Board of Education, 342 U.S. 429, 432, 72 S.Ct. 394, 396, 96 L.Ed. 475.

In my view, the only constitutional question raised by appellant is whether failure to give adequate notice of the hearing on compensation of itself invalidates the taking of his land, apart from any claim of loss. We have held many times that the State's interest in the expeditious handling of condemnation proceedings justifies the taking of land prior to payment, without violating the Due Process Clause, so long as adequate provision for payment of compensation is made. See, e.g., Bragg v. Weaver, 251 U.S. 57, 62, 40 S.Ct. 62, 64, 64 L.Ed. 135. Appellant must be able to show that the provisions for payment, as they operated in his case, were inadequate before he can attack the Kansas statutory scheme for compensation in condemnation cases. See Ashwander v. T.V.A., 297 U.S. 288, 347, 56 S.Ct. 466, 483, 80 L.Ed. 688 and cases cited note 6 (Brandeis, J., concurring); cf. Smith v. State of Indiana, 191 U.S. 138, 148--149, 24 S.Ct. 51, 52, 48 L.Ed. 125. Since on the record before us the compensation was not alleged to be inadequate, the taking was valid and the judgment of the Kansas Supreme Court should be affirmed. At the very least, the case should be returned to the Kansas court so that we may have the benefit of its construction of the pleadings. See Honeyman v. Hanan, 300 U.S. 14, 57 S.Ct. 350, 81 L.Ed. 476.

But the Court, without explicitly construing the pleadings, passes upon the constitutionality of Kan.Gen.Stat.1949, s 26--202. Without intimating any opinion whether in the circumstances of this case appellant was denied the due process required in determining fair compensation for property taken under the power of ***122** eminent domain, I feel constrained to point out that the Court's decision does not hold the taking itself invalid and therefore does not require the Kansas court to grant an injunction so long as appellant's rights are protected.

APPENDIX.
'In District Court of Reno County, Kansas
'Amended Petition

'Comes now Lee Walker, the plaintiff herein, by his attorneys, Oswald & Mitchell, and for his cause of action against the City of Hutchinson, Reno County, Kansas, T. E. Chenoweth, City Manager, Robert G. King, Mayor and Members of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodward and C. E. Johnson, Members of the City Commission, all of the City ****206** of Hutchinson, Reno County, Kansas, respectfully states to the Court:

'2. That the Plaintiff is a resident of Hutchinson, Reno County, Kansas, and that his post office address is 907 East 11th Street, Hutchinson, Kansas; that he is a Negro; that he was born in Bargtown, Kentucky on the 15th day of October, 1875; and that he had, as a youth, an education equivalent to the Sixth Grade.

'3. That Defendant City of Hutchinson, Reno County, Kansas is a municipal corporation; that the above named individual Defendants are respectively T. E. Chenoweth, City Manager, Robert G. King, Mayor and a member of the City Commission, Charles N. Brown, Jerry Stremel, R. C. Woodard and C. E. Johnson, members of the City Commission, all of the City of Hutchinson.

***123** '4. That on or about the 27th day of February, 1905, the Plaintiff acquired fee simple title through a Warranty Deed, duly executed by one Arthur Walker, which deed was duly recorded with the Register of Deeds of Reno County, Kansas, on the 28th day of February, 1905, in Book 85, Page 479, to the following described real estate, all situated in Reno County, Kansas:

'Lots thirty-seven (37), thirty-eight (38), thirty-nine (39), forty (40), forty-one (41), forty-two (42), forty-three (43), forty-four (44), forty-five (45), forty-six (46), forty-seven (47) and forty-eight (48), Block Five (5), Maple Grove Addition to the City of Hutchinson,

'and ever since that time, the Plaintiff has owned same, enjoyed quiet and peaceful possession thereof and likewise has had and enjoyed all the fruits of such ownership, and has paid, from time to time, all

assessments and taxes of every kind and nature legally assessed against said real estate; that he is therefore now the legal and equitable owner of said real estate.

'5. That on or about the 12th day of April, 1954, the defendant City of Hutchinson, through its duly elected or appointed, qualified and acting officials, filed an action in the District Court of Reno County, Kansas, entitled:

> 'In the matter of the application of the city of Hutchinson, Kansas, a municipal corporation, for the appointment of commissioners in the matter of the condemnation of property for the acquisition of right of way for the opening, widening and extending of portions of Eleventh Avenue, Harrison Street and Twenty-third Avenue in the city of Hutchison, Kansas,

'the same being docketed as Case No. 7867.

'6. That said action was for the purpose of taking from the Plaintiff and condemning certain portions of the above ***124** described real estate, as a by-pass, so to speak, for Hutchinson's Super-Sports Arena.

'7. That the Plaintiff has never been, at any time, notified in any manner that the City of Hutchinson coveted the bit of real estate as a by-pass to Hutchinson's Super-Sports Arena he has owned since 1905; nor has he ever been served with any summons, nor given any other personal notice of any kind whatsoever that said defendant City of Hutchinson had filed the aforesaid action for the purpose of taking a part of his said real estate.

'8. That the pretended right of defendant City of Hutchinson to the real estate above legally described, owned by the Plaintiff, rests upon the authority, so far as this Plaintiff and counsel have been able to ascertain, of G.S. 26--201 and 26--202, and Reno County, Kansas District Court Case No. 7867, more fully described in Paragraph 5 herein, brought thereunder, which statute or statutes are void and of no force and effect whatsoever, because same attempt ****207** to vest the power in certain municipalities to take property without due process of law.

'9. That the only notice to an owner of real property, which G.S. 26--201 and 26--202 requires is by publication, which is not sufficient notice under the above mentioned due process clauses of both Federal and State Constitutions.

'10. That the Plaintiff had no actual notice, and did not actually know, or have any reason to know that Defendants sought to condemn and take his land, until approximately the middle part of August, 1954; unless by a peculiar quirk of the imagination, it can be said that the single legal publication, published just once in The Hutchinson News-Herald, and that on the 14th day of April, 1954, gave him notice; that said single notice so published in the official newspaper was not sufficient notice to satisfy the requirements of the Due Process clauses of both Federal and State Constitutions.

***125** '11. That at the present moment defendant City of Hutchinson, either itself, or by contractors employed by it, is, or is threatening to enter upon said real estate owned by the Plaintiff, and this for the purpose of building a highway across said real estate, all in utter and complete disregard of the rights of this Plaintiff.

'12. That the Plaintiff is entitled to an Order of this Court instanter, enjoining and restraining defendant City of Hutchinson from entering upon, or in any manner trespassing upon said real estate, for the reason, inter alia, that there is no other remedy, either at law or in equity, open to the Plaintiff; that if said defendant City of Hutchinson is not so restrained and enjoined, the Plaintiff will suffer irreparable damage by reason thereof.

'13. That the Plaintiff is advised that in some orders by Courts of competent jurisdiction, in the granting of a restraining order, or temporary injunction of this nature, the party seeking same, and obtaining same, is required to post certain indemnity or other type of bond or bonds; that the Plaintiff hereby respectfully and humbly advises the Court that by reason of his limited financial resources, he cannot post such a bond, and therefore asks, upon the above and foregoing statement of facts, that the Court does not make the giving of such a bond or bonds as a condition precedent to Plaintiff's obtaining a restraining order or temporary injunction at this time.

'14. That by reason of the above and foregoing facts, the Plaintiff is entitled to have, and desires to have a permanent injunction against defendant City of Hutchinson, restraining and enjoining it, and its servants, agents and all others in its employment, from entering or trespassing upon the Plaintiff's real estate, above described, or preventing him from otherwise enjoying the quiet and peaceful enjoyment thereof.

'Wherefore and by reason of the foregoing, the Plaintiff prays for an immediate Order of this Court restraining ***126** and enjoining defendant City of Hutchinson from entering or trespassing upon the Plaintiff's real estate, above described. and the Plaintiff further prays for a judgment of this Court permanently enjoining and restraining the City of Hutchinson from entering or trespassing upon Plaintiff's real estate, above described; and Plaintiff further prays for judgment for his costs herein, and for such other and further relief as to this Court seem just and equitable.'

Mr. Justice BURTON, dissenting.

If the issue in this case is the constitutionality of the statutory provision made for taking the property, its constitutionality seems clear. If, as I assume to be the case, the issue is the constitutional sufficiency of the statutory ****208** ten-day notice by publication of the hearing to assess the compensation for the land taken, I consider such a provision to be within the constitutional discretion of the lawmaking body of the State.

In weighing the 'due process' of condemnation procedure some reasonable balance must be struck between the needs of the public to acquire the property, and the opportunity for a hearing as to the compensation to be paid for the property. Just compensation is constitutionally necessary, but the length and kind of notice of the proceeding to determine such compensation is largely a matter of legislative discretion. The minimum notice required by this statute may seem to some to be inadequate or undesirably short, but it was satisfactory to the lawmakers of Kansas. It also has been upheld by the Supreme Court of Kansas and the United States Court of Appeals for the Tenth Circuit. To proscribe it as violative of the Federal Constitution fails to allow adequate scope to local legislative discretion. Accordingly, while not passing upon the desirability of the statutory requirement ***127** before us, I am not ready to hold that the Constitution of the United States prohibits the people of Kansas from choosing that standard. Particularly, I am not ready to throw a nationwide cloud of undertainty upon the validity of condemnation proceedings based on compliance with similar local statutes. Since 1889, it has been settled that notice by publication in condemnation proceedings to take and to fix the value to be paid for the land of a nonresident comports with due process. Huling v. Kaw Valley Ry. & Imp. Co., 130 U.S. 559, 9 S.Ct. 603, 32 L.Ed. 1045. See also, North Laramie Land Co. v. Hoffman, 268 U.S. 276, 283--287, 45 S.Ct. 491, 494--495, 69 L.Ed. 953; Bragg v. Weaver, 251 U.S. 57, 40 S.Ct. 62, 64 L.Ed. 135.

I agree with the court below and with the opinion of the Court of Appeals for the Tenth Circuit rendered in the comparable case of Collins v. City of Wichita, 225 F.2d 132, which came to our attention at the last term of Court and in which certiorari was denied on November 7, 1955, 350 U.S. 886, 76 S.Ct. 140. Therefore, I would affirm the judgment here.

352 U.S. 112, 77 S.Ct. 200, 1 L.Ed.2d 178

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84 S.Ct. 526
376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481
(Cite as: 376 U.S. 1, 84 S.Ct. 526)

Supreme Court of the United States

James P. WESBERRY, Jr., et al., Appellants,
v.
Carl E. SANDERS, etc., et al.

No. 22.

Argued Nov. 18 and 19, 1963.
Decided Feb. 17, 1964.

Action, in the United States District Court for the Northern District of Georgia, by qualified voters to strike down Georgia statute prescribing congressional districts. The three-judge District Court, 206 F.Supp. 276, dismissed the complaint, and plaintiffs appealed. The Supreme Court, Mr. Justice Black, held that the complaint presented a justiciable controversy, and that apportionment of congressional districts so that single congressman represented from two to three times as many Fifth District voters as were represented by each of congressmen from other Georgia districts grossly discriminated against voters in Fifth District in violation of constitutional requirement that representatives be chosen by people of the several states.

Reversed and remanded.

Mr. Justice Clark dissented in part; Mr. Justice Harlan and Mr. Justice Stewart dissented.

West Headnotes

[1] Federal Courts ⇐480
170Bk480 Most Cited Cases
(Formerly 30k1192)
Under circumstances, upon reversal of judgment dismissing complaint alleging unconstitutional disparity among congressional districts, Supreme Court would leave question of relief for further consideration and decision by district court. 42 U.S.C.A. §§ 1983, 1988; 28 U.S.C.A. § 1343(3); Code Ga. § 34-2301.

[2] Constitutional Law ⇐68(3)
92k68(3) Most Cited Cases
Congressional apportionment cases are justiciable. U.S.C.A.Const. art. 1.

[3] Constitutional Law ⇐68(3)
92k68(3) Most Cited Cases
Constitutional provision that times, places and manner of holding elections should be prescribed by states and Congress does not immunize state congressional apportionment laws which debase citizen's right to vote from power of court to protect constitutional rights of individuals from legislative destruction. U.S.C.A.Const. art. 1, § 4.

[4] Constitutional Law ⇐46(2)
92k46(2) Most Cited Cases

[4] Constitutional Law ⇐68(3)
92k68(3) Most Cited Cases
Complaint alleging deprivation of constitutional rights through disparity in congressional districts was not subject to dismissal either on ground of want of equity or ground of nonjusticiability. 42 U.S.C.A. §§ 1983, 1988; 28 U.S.C.A. § 1343(3); Code Ga. § 34-2301; U.S.C.A.Const. art. 1, §§ 2, 4; Amend. 14, §§ 1, 2.

[5] United States ⇐10
393k10 Most Cited Cases
Georgia apportionment of congressional districts so that single congressman represented from two to three times as many Fifth District voters as were represented by each of congressmen from other Georgia districts grossly discriminated against voters in Fifth District in violation of constitutional requirement that representatives be chosen by people of the several states. Code Ga. § 34-2301; U.S.C.A.Const. art. 1, § 2.

[6] United States ⇐10
393k10 Most Cited Cases
Constitutional command that representatives be chosen by people of the several states means that as nearly as practicable one man's vote in congressional election is to be worth as much as another's. U.S.C.A.Const. art. 1, § 2.

[7] United States ⇐10
393k10 Most Cited Cases
Those who framed the Constitution meant that no matter what mechanics of election, whether state

wide or by districts, it was population which was to be basis of House of Representatives. U.S.C.A.Const. art. 1, § 2.

[8] United States ⚿10

393k10 Most Cited Cases

Delegates to Constitutional Convention intended that, in allocating congressmen, number assigned to each state should be determined solely by number of state's inhabitants.

[9] United States ⚿7.1

393k7.1 Most Cited Cases

(Formerly 393k7)

Constitutional provision that representatives are to be chosen by people of the several states must be construed in light of its history. U.S.C.A.Const. art. 1, § 2.

[10] Elections ⚿1

144k1 Most Cited Cases

[10] United States ⚿7.1

393k7.1 Most Cited Cases

(Formerly 393k7)

Right to vote cannot be denied outright, and it cannot, consistently with constitutional provision that representatives should be chosen by people of the several states, be destroyed by alteration of ballots. U.S.C.A.Const. art. 1, § 2.

[11] Elections ⚿1

144k1 Most Cited Cases

No right is more precious in a free country than that of having a voice in the election of those who make laws; other rights, even the most basic, are illusory if right to vote is undermined.

[12] United States ⚿10

393k10 Most Cited Cases

That it may not be possible to draw congressional districts with mathematical precision is no excuse for ignoring Constitution's plain objective of making equal representation for equal numbers of people fundamental goal for House of Representatives. U.S.C.A.Const. art. 1, § 2.

****527 *2** Emmet J. Bondurant II, Atlanta, Ga., for appellants.

Frank T. Cash, Atlanta, Ga., for appellants, pro hac vice, by special leave of Court.

Paul Rodgers, Atlanta, Ga., for appellees.

Bruce J. Terris, Washington, D.C., for the United States, as amicus curiae, by special leave of Court.

Mr. Justice BLACK delivered the opinion of the Court.

[1] Appellants are citizens and qualified voters of Fulton County, Georgia, and as such are entitled to vote in congressional elections in Georgia's Fifth Congressional District. That district, one of ten created by a 1931 Georgia statute, [FN1] includes Fulton, DeKalb, and Rockdale Counties and has a population according to the 1960 census of 823,680. The average population of the ten districts is 394,312, less than half that of the Fifth. One district, the Ninth, has only 272,154 people, less than one-third as many as the Fifth. Since there is only one Congressman for each district, this inequality of population means that the Fifth District's Congressman has to represent from two to three times as many people as do Congressmen from some of the other Georgia districts.

FN1. Ga.Code s 34--2301.

***3** Claiming that these population disparities deprived them and voters similarly situated of a right under the Federal Constitution to have their votes for Congressmen given the same weight as the votes of other Georgians, the appellants brought this action under 42 U.S.C. ss 1983 and 1988 and 28 U.S.C. s 1343(3) asking that the Georgia statute be declared invalid and that the appellees, the Governor and Secretary of State of Georgia, be enjoined from conducting elections under it. The complaint alleged that appellants were deprived of the full benefit of their right to vote, in violation of (1) Art. I, s 2, of the Constitution of the United States, which provides that 'The House of Representatives shall be composed of Members chosen every second Year by the People of the several States * * *'; (2) the Due Process, Equal Protection, and Privileges and Immunities Clauses of the Fourteenth Amendment; and (3) that part of Section 2 of the Fourteenth Amendment which provides that 'Representatives shall be apportioned among the several States according to their respective numbers * * *.'

The case was heard by a three-judge District Court, which found unanimously, from facts not disputed, that:

'It is clear by any standard * * * that the population of the Fifth District ****528** is grossly

out of balance with that of the other nine congressional districts of Georgia and in fact, so much so that the removal of DeKalb and Rockdale Counties from the District, leaving only Fulton with a population of 556,326, would leave it exceeding the average by slightly more than forty per cent.' [FN2]

FN2. Wesberry v. Vandiver, D.C., 206 F.Supp. 276, 279--280.

Notwithstanding these findings, a majority of the court dismissed the complaint, citing as their guide Mr. Justice Frankfurter's minority opinion in Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, an opinion stating that challenges to apportionment ***4** of congressional districts raised only 'political' questions, which were not justiciable. Although the majority below said that the dismissal here was based on 'want of equity' and not on nonjusticiability, they relied on no circumstances which were peculiar to the present case; instead, they adopted the language and reasoning of Mr. Justice Frankfurter's Colegrove opinion in concluding that the appellants had presented a wholly 'political' question. [FN3] Judge Tuttle, disagreeing with the court's reliance on that opinion, dissented from the dismissal, though he would have denied an injunction at that time in order to give the Georgia Legislature ample opportunity to correct the 'abuses' in the apportionment. He relied on Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, which, after full discussion of Colegrove and all the opinions in it, held that allegations of disparities of population in state legislative districts raise justiciable claims on which courts may grant relief. We noted probable jurisdiction. 374 U.S, 802, 83 S.Ct. 1691, 10 L.Ed.2d 1029. We agree with Judge Tuttle that in debasing the weight of appellants' votes the State has abridged the right to vote for members of Congress guaranteed them by the United States Constitution, that the District Court should have entered a declaratory judgment to that effect, and that it was therefore error to dismiss this suit. The question of what relief should be given we leave for further consideration and decision by the District Court in light of existing circumstances.

FN3. 'We do not deem (Colegrove v. Green) * * * to be a precedent for dismissal based on the nonjusticiability of a political question involving the Congress as here, but we do deem it to be strong authority for dismissal for want of equity when the following factors here involved are considered on balance: a political question involving a coordinate branch of the federal government; a political question posing a delicate problem difficult of solution without depriving others of the right to vote by district, unless we are to redistrict for the state; relief may be forthcoming from a properly apportioned state legislature; and relief may be afforded by the Congress.' 206 F.Supp., at 285 (footnote omitted).

***5** I.

Baker v. Carr, supra, considered a challenge to a 1901 Tennessee statute providing for apportionment of State Representatives and Senators under the State's constitution, which called for apportionment among counties or districts 'according to the number of qualified electors in each.' The complaint there charged that the State's constitutional command to apportion on the basis of the number of qualified voters had not been followed in the 1901 statute and that the districts were so discriminatorily disparate in number of qualified voters that the plaintiffs and persons similarly situated were, 'by virtue of the debasement of their votes,' denied the equal protection of the laws guaranteed them by the Fourteenth Amendment. [FN4] The cause there of the alleged 'debasement' of votes for state legislators--districts containing widely varying numbers of people--was precisely that which was alleged to debase votes for Congressmen ****529** in Colegrove v. Green, supra, and in the present case. The Court in Baker pointed out that the opinion of Mr. Justice Frankfurter in Colegrove, upon the reasoning of which the majority below leaned heavily in dismissing 'for want of equity,' was approved by only three of the seven Justices sitting. [FN5] After full consideration of Colegrove, the Court in Baker held (1) that the District Court had jurisdiction of the subject matter; (2) that the qualified Tennessee voters there had standing to sue; and ***6** (3) that the plaintiffs had stated a justiciable cause of action on which relief could be granted.

FN4. 369 U.S., at 188, 82 S.Ct. at 694, 7 L.Ed.2d 663.

FN5. Mr. Justice Rutledge in Colegrove believed that the Court should exercise its equitable discretion to refuse relief because 'The shortness of the time remaining (before the next election) makes it doubtful whether action could, or would, be taken in time to secure for petitioners the effective relief they seek.' 328 U.S., at 565, 66 S.Ct. at 1208, 90 L.Ed. 1432. In a later separate opinion he emphasized that his vote in Colegrove had been based on the 'particular circumstances' of that case. Cook v. Fortson, 329 U.S. 675, 678, 67 S.Ct. 21, 22, 91 L.Ed. 596.

[2][3][4] The reasons which led to these conclusions in Baker are equally persuasive here. Indeed, as one of the grounds there relied on to support our holding that state apportionment controversies are justiciable we said:

'* * * Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795; Koenig v. Flynn, 285 U.S. 375, 52 S.Ct. 403, 76 L.Ed. 805, and Carroll v. Becker, 285 U.S. 380, 52 S.Ct. 402, 76 L.Ed. 807, concerned the choice of Representatives in the Federal Congress. Smiley, Koenig and Carroll settled the issue in favor of justiciability of questions of congressional redistricting. The Court followed these precedents in Colegrove although over the dissent of three of the seven Justices who participated in that decision.' [FN6]

FN6. 369 U.S., at 232, 82 S.Ct. at 718, 7 L.Ed.2d 663. Cf. also Wood v. Broom, 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131.

This statement in Baker, which referred to our past decisions holding congressional apportionment cases to be justiciable, we believe was wholly correct and we adhere to it. Mr. Justice Frankfurter's Colegrove opinion contended that Art. I, s 4, of the Constitution [FN7] had given Congress 'exclusive authority' to protect the right of citizens to vote for Congressmen, [FN8] but we made it clear in Baker that nothing in the language of that article gives support to a construction that would immunize state congressional apportionment laws which debase a citizen's right to vote from the power of courts to protect the constitutional rights of individuals from legislative destruction, a power recognized at least since our decision in Marbury v. Madison, 1 Cranch 137, 2 L.Ed. 60, in 1803. Cf. *7 Gibbons v. Ogden, 9 Wheat. 1, 6 L.Ed. 23. The right to vote is too important in our free society to be stripped of judicial protection by such an interpretation of Article I. This dismissal can no more be justified on the ground of 'want of equity' than on the ground of 'non-justiciability.' We therefore hold that the District Court erred in dismissing the complaint.

FN7. 'The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. * * *' U.S.Const., Art. I, s 4.

FN8. 328 U.S., at 554, 66 S.Ct. at 1200, 90 L.Ed. 1432.

II.

[5] This brings us to the merits. We agree with the District Court that the 1931 Georgia apportionment grossly discriminates against voters in the Fifth Congressional District. A single Congressman represents from two to three **530 times as many Fifth District voters as are represented by each of the Congressmen from the other Georgia congressional districts. The apportionment statute thus contracts the value of some votes and expands that of others. If the Federal Constitution intends that when qualified voters elect members of Congress each vote be given as much weight as any other vote, then this statute cannot stand.

[6][7] We hold that, construed in its historical context, the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' [FN9] means that as *8 nearly as is practicable one man's vote in a congressional election is to be worth as much as another's. [FN10] This rule is followed automatically, of course, when Representatives are chosen as a group on a statewide basis, as was a widespread practice in the first 50 years of our Nation's history. [FN11] It

would be extraordinary to suggest that in such statewide elections the votes of inhabitants of some parts of a State, for example, Georgia's thinly populated Ninth District, could be weighted at two or three times the value of the votes of people living in more populous parts of the State, for example, the Fifth District around Atlanta. Cf. Gray v. Sanders, 372 U.S. 368, 83 S.Ct. 801, 9 L.Ed.2d 821. We do not believe that the Framers of the Constitution intended to permit the same vote-diluting discrimination to be accomplished through the device of districts containing widely varied numbers of inhabitants. To say that a vote is worth more in one district than in another would not only run counter to our fundamental ideas of democratic government, it would cast aside the principle of a House of Representatives elected 'by the People,' a principle tenaciously fought for and established at the Constitutional Convention. The history of the Constitution, particularly that part of it relating to the adoption of Art. I, s 2, reveals that those who framed the Constitution ***9** meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.

FN9. 'The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
'Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative * * *.' U.S.Const. Art. I, s 2.
The provisions for apportioning Representatives and direct taxes have been amended by the Fourteenth and Sixteenth Amendments, respectively.

FN10. We do not reach the arguments that the Georgia statute violates the Due Process, Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment.

FN11. As late as 1842, seven States still conducted congressional elections at large. See Paschal, 'The House of Representatives: 'Grand Depository of the Democratic Principle'?' 17 Law & Contemp. Prob. 276, 281 (1952).

During the Revolutionary War the rebelling colonies were loosely allied in the Continental Congress, a body with authority to do little more than pass resolutions and issue requests for men and supplies. Before the war ended the Congress had proposed and secured the ratification by the States of a somewhat closer association under the Articles of Confederation. Though the Articles established a central government for the United ****531** States, as the former colonies were even then called, the States retained most of their sovereignty, like independent nations bound together only by treaties. There were no separate judicial or executive branches: only a Congress consisting of a single house. Like the members of an ancient Greek league, each State, without regard to size or population, was given only one vote in that house. It soon became clear that the Confederation was without adequate power to collect needed revenues or to enforce the rules its Congress adopted. Farsighted men felt that a closer union was necessary if the States were to be saved from foreign and domestic dangers.

The result was the Constitutional Convention of 1787, called for 'the sole and express purpose of revising the Articles of Confederation * * *' [FN12] When the Convention ***10** met in May, this modest purpose was soon abandoned for the greater challenge of creating a new and closer form of government than was possible under the Confederation. Soon after the Convention

assembled, Edmund Randolph of Virginia presented a plan not merely to amend the Articles of Confederation but to create an entirely new National Government with a National Executive, National Judiciary, and a National Legislature of two Houses, one house to be elected by 'the people,' the second house to be elected by the first. [FN13]

FN12. 3 The Records of the Federal Convention of 1787 (Farrand ed. 1911) 14 (hereafter cited as 'Farrand').
James Madison, who took careful and complete notes during the Convention, believed that in interpreting the Constitution later generations should consider the history of its adoption:
'Such were the defects, the deformities, the diseases and the ominous prospects, for which the Convention were to provide a remedy, and which ought never to be overlooked in expounding & appreciating the Constitutional Charter the remedy that was provided.' Id., at 549.

FN13. 1 id., at 20.

The question of how the legislature should be constituted precipitated the most bitter controversy of the Convention. One principle was uppermost in the minds of many delegates: that, no matter where he lived, each voter should have a voice equal to that of every other in electing members of Congress. In support of this principle, George Mason of Virginia
'argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the Govt.' [FN14]

FN14. Id., at 48.

James Madison agreed, saying 'If the power is not immediately derived from the people, in proportion to their numbers, we may make a paper confederacy, but that will be all.' [FN15] Repeatedly, delegates rose to make the same point: that it would be unfair, unjust, and contrary to common sense to give a small number of people as many Senators or Representatives as were allowed to much larger groups [FN16]--in short, as James Wilson of Pennsylvania *11 put it, 'equal numbers of people ought to have an equal no. of representatives * * *' and representatives 'of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.' [FN17]

FN15. Id., at 472.

FN16. See, e.g., id., at 197--198 (Benjamin Franklin of Pennsylvania); id., at 467 (Elbridge Gerry of Massachusetts); id., at 286, 465--466 (Alexander Hamilton of New York); id., at 489--490 (Rufus King of Massachusetts); id., at 322, 446--449, 486, 527--528 (James Madison of Virginia); id., at 180, 456 (Hugh Williamson of North Carolina); id., at 253--254, 406, 449--450, 482--484 (James Wilson of Pennsylvania).

FN17. Id., at 180.

Some delegates opposed election by the people. The sharpest objection arose out **532 of the fear on the part of small States like Delaware that if population were to be the only basis of representation the populous States like Virginia would elect a large enough number of representatives to wield overwhelming power in the National Government. [FN18] Arguing that the Convention had no authority to depart from the plan of the Articles of Confederation which gave each State an equal vote in the National Congress, William Paterson of New Jersey said, 'If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty.' [FN19] To this end he proposed a single legislative chamber in which each State, as in the Confederation, was to have an equal vote. [FN20] A number of delegates supported this plan. [FN21]

FN18. Luther Martin of Maryland declared
'that the States being equal cannot treat or confederate so as to give up an equality of votes without giving up their liberty: that the propositions on the table were a system of slavery for 10 States: that as Va.Masts. & Pa. have 42/90 of the votes they can do

as they please without a miraculous Union of the other ten: that they will have nothing to do, but to gain over one of the ten to make them compleat masters of the rest * * *.' Id., at 438.

FN19. Id., at 251.

FN20. 3 id., at 613.

FN21. E.g., 1 id., at 324 (Alexander Martin of North Carolina); id., at 437--438, 439--441, 444--445, 453-455 (Luther Martin of Maryland); id., at 490--492 (Gunning Bedford of Delaware).

The delegates who wanted every man's vote to count alike were sharp in their criticism of giving each State, ***12** regardless of population, the same voice in the National Legislature. Madison entreated the Convention 'to renounce a principle wch. was confessedly unjust,' [FN22] and Rufus King of Massachusetts 'was prepared for every event, rather than sit down under a Govt. founded in a vicious principle of representation and which must be as shortlived as it would be unjust.' [FN23]

FN22. Id., at 464.

FN23. Id., at 490.

The dispute came near ending the Convention without a Constitution. Both sides seemed for a time to be hopelessly obstinate. Some delegations threatened to withdraw from the Convention if they did not get their way. [FN24] Seeing the controversy growing sharper and emotions rising, the wise and highly respected Benjamin Franklin arose and pleaded with the delegates on both sides to 'part with some of their demands, in order that they may join in some accomodating proposition.' [FN25] At last those who supported representation of the people in both houses and those who supported it in neither were brought together, some expressing the fear that if they did not reconcile their differences, 'some foreign sword will probably do the work for us.' [FN26] The deadlock was finally broken when a majority of the States agreed to what has been called the Great Compromise, [FN27] based on a proposal which had been repeatedly advanced by Roger ***13** Sherman and other delegates from Connecticut. [FN28] It provided on the one hand that ****533** each State, including little Delaware and Rhode Island, was to have two Senators. As a further guarantee that these Senators would be considered state emissaries, they were to be elected by the state legislatures, Art. I, s 3, and it was specially provided in Article V that no State should ever be deprived of its equal representation in the Senate. The other side of the compromise was that, as provided in Art. I, s 2, members of the House of Representatives should be chosen 'by the People of the several States' and should be 'apportioned among the several States * * * according to their respective Numbers.' While those who wanted both houses to represent the people had yielded on the Senate, they had not yielded on the House of Representatives. William Samuel Johnson of Connecticut had summed it up well: 'in one branch the people, ought to be represented; in the other, the States.' [FN29]

FN24. Gunning Bedford of Delaware said:
'We have been told (with a dictatorial air) that this is the last moment for a fair trial in favor of a good Government. * * * The Large States dare not dissolve the confederation. If they do the small ones will find some foreign ally of more honor and good faith, who will take them by the hand and do them justice.' Id., at 492.

FN25. Id., at 488.

FN26. Id., at 532 (Elbridge Gerry of Massachusetts). George Mason of Virginia urged an 'accomodation' as 'preferable to an appeal to the world by the different sides, as had been talked of by some Gentlemen.' Id., at 533.

FN27. See id., at 551.

FN28. See id., at 193, 342--343 (Roger Sherman); id., at 461-- 462 (William Samuel Johnson).

FN29. Id., at 462. (Emphasis in original.)

[8] The debates at the Convention make at least

one fact abundantly clear: that when the delegates agreed that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants. [FN30] The Constitution embodied Edmund Randolph's proposal for a periodic census to ensure 'fair representation of the people,' [FN31] an idea endorsed by Mason as assuring that 'numbers of inhabitants' ***14** should always be the measure of representation in the House of Representatives. [FN32] The Convention also overwhelmingly agreed to a resolution offered by Randolph to base future apportionment squarely on numbers and to delete any reference to wealth. [FN33] And the delegates defeated a motion made by Elbridge Gerry to limit the number of Representatives from newer Western States so that it would never exceed the number from the original States. [FN34]

FN30. While 'free Persons' and those 'bound to Service for a Term of Years' were counted in determining representation, Indians not taxed were not counted, and 'three fifths of all other Persons' (slaves) were included in computing the States' populations. Art. I, s 2. Also, every State was to have 'at Least one Representative.' Ibid.

FN31. 1 Farrand, at 580.

FN32. Id., at 579.

FN33. Id., at 606. Those who thought that one branch should represent wealth were told by Roger Sherman of Connecticut that the 'number of people alone (was) the best rule for measuring wealth as well as representation; and that if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers.' Id., at 582.

FN34. 2 id., at 3. The rejected thinking of those who supported the proposal to limit western representation is suggested by the statement of Gouverneur Morris of Pennsylvania that 'The Busy haunts of men not the remote wilderness, was the proper School of political Talents.' 1 id., at 583.

It would defeat the principle solemnly embodied in the Great Compromise--equal representation in the House for equal numbers of people--for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater voice in choosing a Congressman than others. The House of Represenatives, the Convention agreed, was to represent the people as individuals, and on a basis of complete equality for each voter. The delegates were quite aware of what Madison called the 'vicious representation' in Great Britain [FN35] whereby 'rotten boroughs' with few inhabitants were represented in Parliament on or almost on a par with cities of greater population. Wilson urged that people must be represented as individuals, so that America would escape ***15** the evils of the English system under which one man could send two members of Parliament to represent the borough of Old Sarum while London's ****534** million people sent but four. [FN36] The delegates referred to rotten borough apportionments in some of the state legislatures as the kind of objectionable governmental action that the Constitution should not tolerate in the election of congressional representatives. [FN37]

FN35. Id., at 464.

FN36. Id., at 457. 'Rotten boroughs' have long since disappeared in Great Britain. Today permanent parliamentary Boundary Commissions recommend periodic changes in the size of constituencies, as population shifts. For the statutory standards under which these commissions operate, see House of Commons (Redistribution of Seats) Acts of 1949, 12 & 13 Geo. 6, c. 66, Second Schedule, and of 1958, 6 & 7 Eliz. 2, c. 26, Schedule.

FN37. 2 id., at 241.

Madison in The Federalist described the system of division of States into congressional districts, the method which he and others [FN38] assumed States probably would adopt: 'The city of Philadelphia is supposed to contain between fifty and sixty thousand souls. It will therefore form nearly two districts for the choice of Federal Representatives.' [FN39] '(N)umbers,' he said, not only are a suitable

way to represent wealth but in any event 'are the only proper scale of representation.' [FN40] In the state conventions, speakers urging ratification of the Constitution emphasized the theme of equal representation in the House which had permeated the debates in Philadelphia. ***16** [FN41] Charles Cotesworth Pinckney told the South Carolina Convention, 'the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually * * *.' [FN42] Speakers at the ratifying conventions emphasized that the House of Representatives was meant to be free of the malapportionment then existing in some of the State legislatures--such as those of Connecticut, Rhode Island, and South Carolina--and argued that the power given Congress in Art. I, s 4, [FN43] was meant to be used to vindicate the people's right to equality of representation in the House. [FN44] Congress' power, said John Steele at the North Carolina convention, was not to be used to allow Congress to create rotten boroughs; in answer to another delegate's suggestion that Congress might use its power to favor people living near the seacoast, Steele said that Congress 'most probably' would 'lay the state off into districts,' and if it made laws 'inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them.' [FN45]

FN38. See, e.g., 2 Works of Alexander Hamilton (Lodge ed. 1904) 25 (statement to New York ratifying convention).

FN39. The Federalist, No. 57 (Cooke ed. 1961), at 389.

FN40. Id., No. 54, at 368. There has been some question about the authorship of Numbers 54 and 57, see The Federalist (Lodge ed. 1908) xxiii-xxxv, but it is now generally believed that Madison was the author, see e.g., The Federalist (Cooke ed. 1961) xxvii; The Federalist (Van Doren ed. 1945) vi--vii; Brant, Settling the Authorship of The Federalist,' 67 Am.Hist.Rev. 71 (1961).

FN41. See, e.g., 2 The Debates in the Several State Conventions on the Adoption of the Federal Constitution (2d Elliot ed. 1836) 11 (Fisher Ames, in the Massachusetts Convention) (hereafter cited as 'Elliot'); id., at 202 (Oliver Wolcott, Connecticut); 4 id., at 21 (William Richardson Davie, North Carolina); id., at 257 (Charles Pinckney, South Carolina).

FN42. Id., at 304.

FN43. 'The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators. * * *' U.S.C.onst. Art. I, s 4.

FN44. See 2 Elliot, at 49 (Francis Dana, in the Massachusetts Convention); id., at 50--51 (Rufus King, Massachusetts); 3 id., at 367 (James Madison, Virginia).

FN45. 4 Id., at 71.

***17** Soon after the Constitution was adopted, James Wilson of Pennsylvania, by then an Associate Justice of this Court, ****535** gave a series of lectures at Philadelphia in which, drawing on his experience as one of the most active members of the Constitutional Convention, he said:

'(A)ll elections ought to be equal. Elections are equal, when a given number of citizens, in one part of the state, choose as many representatives, as are chosen by the same number of citizens, in any other part of the state. In this manner, the proportion of the representatives and of the constituents will remain invariably the same.' [FN46]

FN46. 2 The Works of James Wilson (Andrews ed. 1896) 15.

[9][10][11] It is in the light of such history that we must construe Art. I, s 2, of the Constitution, which, carrying out the ideas of Madison and those of like views, provides that Representatives shall be chosen 'by the People of the several States' and shall be 'apportioned among the several States * * * according to their respective Numbers.' It is not surprising that our Court has held that this Article

gives persons qualified to vote a constitutional right to vote and to have their votes counted. United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355; Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274. Not only can this right to vote not be denied outright, it cannot, consistently with Article I, be destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, or diluted by stuffing of the ballot box, see United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341. No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined. Our Constitution leaves no room for classification of people in a way that unnecessarily abridges ***18** this right. In urging the people to adopt the Constitution, Madison said in No. 57 of The Federalist:

> 'Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the haughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States. * * *' [FN47]
>
> FN47. The Federalist, No. 57 (Cooke ed. 1961), at 385.

Readers surely could have fairly taken this to mean, 'one person, one vote.' Cf. Gray v. Sanders, 372 U.S. 368, 381, 83 S.Ct. 801, 809, 9 L.Ed.2d 821.

[12] While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

Reversed and remanded.

Mr. Justice CLARK, concurring in part and dissenting in part.

Unfortunately I can join neither the opinion of the Court nor the dissent of my Brother HARLAN. It is true that the opening sentence of Art. I, s 2, of the Constitution provides that Representatives are to be chosen 'by the People of the several States * * *.' However, in my view, Brother HARLAN has clearly demonstrated that both the historical background and language preclude a finding that Art. I, s 2, lays down the ipse dixit 'one person, one vote' in congressional elections.

On the other hand, I agree with the majority that congressional districting is subject to judicial scrutiny. This ***19** Court has so held ever since ****536**Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795 (1932), which is buttressed by two companion cases, Koenig v. Flynn, 285 U.S. 375, 52 S.Ct. 403, 76 L.Ed. 805 (1932), and Carroll v. Becker, 285 U.S. 380, 52 S.Ct. 402, 76 L.Ed. 807 (1932). A majority of the Court in Colegrove v. Green felt, upon the authority of Smiley, that the complaint presented a justiciable controversy not reserved exclusively to Congress. Colegrove v. Green, 328 U.S. 549, 564, and 568, n. 3, 66 S.Ct. 1198, 1208, 1209, 90 L.Ed. 1432 (1946). Again in Baker v. Carr, 369 U.S. 186, 232, 82 S.Ct. 691, 718, 7 L.Ed.2d 663 (1962), the opinion of the Court recognized that Smiley 'settled the issue in favor of justiciability of questions of congressional redistricting.' I therefore cannot agree with Brother HARLAN that the supervisory power granted to Congress under Art. I, s 4, is the exclusive remedy.

I would examine the Georgia congressional districts against the requirements of the Equal Protection Clause of the Fourteenth Amendment. As my Brother BLACK said in his dissent in Colegrove v. Green, supra, the 'equal protection clause of the Fourteenth Amendment forbids * * * discrimination. It does not permit the states to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all. * * * No one would deny that the equal protection clause would also prohibit a law that would expressly give certain citizens a half-vote and others a full vote. * * * Such discriminatory legislation seems to me exactly the kind that the equal protection clause was intended to prohibit.' 328 U.S. at 569, 66 S.Ct. at 1210, 90 L.Ed. 1432.

The trial court, however, did not pass upon the merits of the case, although it does appear that it did

make a finding that the Fifth District of Georgia was 'grossly out of balance' with other congressional districts of the State. Instead of proceeding on the merits, the court dismissed the case for lack of equity. I believe that the court erred in so doing. In my view we should therefore vacate this judgment and remand the case for a hearing ***20** on the merits. At that hearing the court should apply the standards laid down in Baker v. Carr, supra.

I would enter an additional caveat. The General Assembly of the Georgia Legislature has been recently reapportioned [FN*] as a result of the order of the three-judge District Court in Toombs v. Fortson, 205 F.Supp. 248 (1962). In addition, the Assembly has created a Joint Congressional Redistricting Study Committee which has been working on the problem of congressional redistricting for several months. The General Assembly is currently in session. If on remand the trial court is of the opinion that there is likelihood of the General Assembly's, reapportioning the State in an appropriate manner, I believe that coercive relief should be deferred until after the General Assembly has had such an opportunity.

FN* Georgia Laws, Sept. 1--Oct. 1962, Extra. Sess., pp. 7--31.

Mr. Justice HARLAN, dissenting.

I had not expected to witness the day when the Supreme Court of the United States would render a decision which casts grave doubt on the constitutionality of the composition of the House of Representatives. It is not an exaggeration to say that such is the effect of today's decision. The Court's holding that the Constitution requires States to select Representatives either by elections at large or by elections in districts composed 'as nearly as is practicable' of equal population places in jeopardy the seats of almost all the members of the present House of Representatives.

In the last congressional election, in 1962, Representatives from 42 States were elected from congressional districts. [FN1] In all but five of those Stataes, the difference between ***21** the populations of the ****537** largest and smallest district exceeded 100,000 persons. [FN2] A difference of this magnitude in the size of districts the average population of which in each State is less than 500,000 [FN3] is presumably not equality among districts 'as nearly as is practicable,' although the Court does not reveal its definition of that phrase. [FN4] Thus, today's decision impugns the validity of the election of 398 Representatives from 37 States, leaving a 'constitutional' House of 37 members now sitting. [FN5]

FN1. Representatives were elected at large in Alabama (8), Alaska (1), Delaware (1), Hawaii (2), Nevada (1), New Mexico (2), Vermont (1), and Wyoming (1). In addition, Connecticut, Maryland, Michigan, Ohio, and Texas each elected one of their Representatives at large.

FN2. The five States are Iowa, Maine, New Hampshire, North Dakota, and Rhode Island. Together, they elect 15 Representatives.
The populations of the largest and smallest districts in each State and the difference between them are contained in an Appendix to this opinion.

FN3. The only State in which the average population per district is greater than 500,000 is Connecticut, where the average population per district is 507,047 (one Representative being elected at large). The difference between the largest and smallest districts in Connecticut is, however, 370,613.

FN4. The Court's 'as nearly as is practicable' formula sweeps a host of questions under the rug. How great a difference between the populations of various districts within a State is tolerable? Is the standard an absolute or relative one, and if the latter to what is the difference in population to be related? Does the number of districts within the State have any relevance? Is the number of voters or the number of inhabitants controlling? Is the relevant statistic the greatest disparity between any two districts in the State or the average departure from the average population per district, or a little of both? May the State consider factors such as area

or natural boundaries (rivers, mountain ranges) which are plainly relevant to the practicability of effective representation? There is an obvious lack of criteria for answering questions such as these, which points up the impropriety of the Court's whole-hearted but heavy-footed entrance into the political arena.

FN5. The 37 'constitutional' Representatives are those coming from the eight States which elected their Representatives at large (plus one each elected at large in Connecticut, Maryland, Michigan, Ohio, and Texas) and those coming from States in which the difference between the populations of the largest and smallest districts was less than 100,000. See notes 1 and 2, supra. Since the difference between the largest and smallest districts in Iowa is 89,250, and the average population per district in Iowa is only 393,934, Iowa's 7 Representatives might well lose their seats as well. This would leave a House of Representatives composed of the 22 Representatives elected at large plus eight elected in congressional districts.
These conclusions presume that all the Representatives from a State in which any part of the congressional districting is found invalid would be affected. Some of them, of course, would ordinarily come from districts the populations of which were about that which would result from an apportionment based solely on population. But a court cannot erase only the the districts which do not conform to the standard announced today, since invalidation of those districts would require that the lines of all the districts within the State be redrawn. In the absence of a reapportionment, all the Representatives from a State found to have violated the standard would presumably have to be elected at large.

***22** Only a demonstration which could not be avoided would justify this Court in rendering a decision the effect of which, inescapably as I see it, is to declare constitutionally defective the very composition of a coordinate branch of the Federal Government. The Court's opinion not only fails to make such a demonstration, it is unsound logically on its face and demonstrably unsound historically.

I.

Before coming to grips with the reasoning that carries such extraordinary consequences, it is important to have firmly in mind the provisions of Article I ****538** of the Constitution which control this case:

'Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

***23** 'Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifths of all other Persons. The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative * * *.

'Section 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

'Section 5. Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members * * *.'

As will be shown, these constitutional provisions and their 'historical context,' ante, p. 530, establish:

1. that congressional Representatives are to be apportioned among the several States largely, but not entirely, according to population;
2. that the States have plenary power to select their allotted Representatives in accordance with

any method of popular election they please, subject only to the supervisory power of Congress; and
3. that the supervisory power of Congress is exclusive.

***24** In short, in the absence of legislation providing for equal districts by the Georgia Legislature or by Congress, these appellants have no right to the judicial relief which they seek. It goes without saying that it is beyond the province of this Court to decide whether equally populated districts is the preferable method for electing Representatives, whether state legislatures would have acted more fairly or wisely had they adopted such a method, or whether Congress has been derelict in not requiring state legislatures to follow that course. Once it is clear that there is no constitutional right at stake, that ends the case.

II.

Disclaiming all reliance on other provisions of the Constitution, in particular those of the Fourteenth Amendment on which the appellants relied below and in this Court, the Court holds that the provision in Art, I, s 2, for election of Representatives 'by the People' means that congressional districts are to be 'as nearly as is practicable' equal in population, ante, p. 530. Stripped of rhetoric and a 'historical context,' ante, p. 530, which bears little resemblance to the evidence found in the pages of history, see infra, pp. 541--547, the Court's opinion supports its holding only with the bland assertion that 'the principle of a House of Representatives elected 'by the People" would be 'cast aside' if 'a vote is worth more in one district than in another,' ante p. 530, i.e., if congressional districts within a State, each electing a single Representative, are not equal in population. The ****539** fact is, however, that Georgia's 10 Representatives are elected 'by the People' of Georgia, just as Representatives from other States are elected 'by the People of the several States.' This is all that the Constitution requires. [FN6]

FN6. Since I believe that the Constitution expressly provides that state legislatures and the Congress shall have exlusive jurisdiction over problems of congressional apportionment of the kind involved in this case, there is no occasion for me to consider whether, in the absence of such provision, other provisions of the Constitution, relied on by the appellants, would confer on them the rights which they assert.

***25** Although the Court finds necessity for its artificial construction of Article I in the undoubted importance of the right to vote, that right is not involved in this case. All of the appellants do vote. The Court's talk about 'debasement' and 'dilution' of the vote is a model of circular reasoning, in which the premises of the argument feed on the conclusion. Moreover, by focusing exclusively on numbers in disregard of the area and shape of a congressional district as well as party affiliations within the district, the Court deals in abstractions which will be recognized even by the politically unsophisticated to have little relevance to the realities of political life.

In any event, the very sentence of Art. I, s 2, on which the Court exclusively relies confers the right to vote for Representatives only on those whom the State has found qualified to vote for members of 'the most numerous Branch of the State Legislature.' Supra, p. 538. So far as Article I is concerned, it is within the State's power to confer that right only on persons of wealth or of a particular sex or, if the State chose, living in specified areas of the State. [FN7] Were Georgia to find the residents of the ***26** Fifth District unqualified to vote for Representatives to the State House of Representatives, they could not vote for Representatives to Congress, according to the express words of Art. I, s 2. Other provisions of the Constitution would, of course, be relevant, but, so far as Art. I, s 2, is concerned, the disqualification would be within Georgia's power. How can it be, then, that this very same sentence prevents Georgia from apportioning its Representatives as it chooses? The truth is that it does not.

FN7. Although it was held in Ex Parte Yarbrought, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274, and subsequent cases, that the right to vote for a member of Congress depends on the Constitution, the opinion noted that the legislatures of the States prescribe the qualifications for electors of

the legislatures and thereby for electors of the House of Representatives. 110 U.S., at 663, 4 S.Ct. at p. 158, 28 L.Ed. 274. See ante, p. 535, and infra, pp. 549--550.

The States which ratified the Constitution exercised their power. A property or taxpaying qualification was in effect almost everywhere. See, e.g., the New York Constitution of 1777, Art. VII, which restricted the vote to freeholders 'possessing a freehold of the value of twenty pounds, * * * or (who) have rented a tenement * * * of the yearly value of forty shillings, and been rated and actually paid taxes to this State.' The constitutional and statutory qualifications for electors in the various States are set out in tabular form in 1 Thorpe, A Constitutional History of the American People 1776--1850 (1898), 93--96. The progressive elimination of the property qualification is described in Sait, American Parties and Elections (Penniman ed., 1952), 16--17. At the time of the Revolution, 'no serious inroads had yet been made upon the privileges of property, which, indeed, maintained in most states a second line of defense in the form of high personal-property qualifications required for membership in the legislature.' Id., at 16 (footnote omitted). Women were not allowed to vote. Thorpe, op. cit., supra, 93--96. See generally Sait, op. cit., supra, 49--54. New Jersey apparently allowed women, as 'inhabitants,' to vote until 1807. See Thorpe, op. cit., supra, 93. Compare N.J.Const.1776, Art. XIII, with N.J.Const.1844, Art. II, 1.

The Court purports to find support for its position in the third paragraph of Art. I, s 2, which provides for the apportionment ****540** of Representatives among the States. The appearance of support in that section derives from the Court's confusion of two issues: direct election of Representatives within the States and the apportionment of Representatives among the States. Those issues are distinct, and were separately treated in the Constitution. The fallacy of the Court's reasoning in this regard is illustrated by its slide, obscured by intervening discussion (see ante, p. 533), from the intention of the delegates at the Philadelphia Convention 'that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants,' ante, p. 533, to a 'principle solemnly embodied in the Great Compromise--equal representation in the House for equal numbers of people,' ante, p. 533. The delegates did have the former intention and made clear *27 provision for it. [FN8] Although many, perhaps most, of them also believed generally--but assuredly not in the precise, formalistic way of the majority of the Court [FN9]--that within the States representation should be based on populations, they did not surreptitiously slip their belief into the Constitution in the phrase 'by the People,' to be discovered 175 years later like a Shakespearian anagram.

FN8. Even that is not strictly true unless the word 'solely' is deleted. The 'three-fifths compromise' was a departure from the principle of representation according to the number of inhabitants of a State. Cf. The Federalist, No. 54, discussed infra, pp. 546--547. A more obvious departure was the provision that each State shall have a Representative regardless of its population. See infra, pp. 540--541.

FN9. The fact that the delegates were able to agree on a Senate composed entirely without regard to population and on the departures from a population-based House, mentioned in note 8, supra, indicates that they recognized the possibility that alternative principles combined with political reality might dictate conclusions inconsistent with an abstract principle of absolute numerical equality.

On the apportionment of the state legislatures at the time of the Constitutional Convention, see Luce, Legislative Principles (1930), 331-- 364; Hacker, Congressional Districting (1963), 5.

Far from supporting the Court, the apportionment of Representatives among the States shows how blindly the Court has marched to its decision. Representatives were to be apportioned among the

States on the basis of free population plus three-fifths of the slave population. Since no slave voted, the inclusion of three-fifths of their number in the basis of apportionment gave the favored States representation far in excess of their voting population. If, then, slaves were intended to be without representation, Article I did exactly what the Court now says it prohibited: it 'weighted' the vote of voters in the slave States. Alternatively, it might have been thought that Representatives elected by free men of a State would speak also for the slaves. But since the slaves added to the representation only of their own State, Representatives ***28** from the slave States could have been thought to speak only for the slaves of their own States, indicating both that the Convention believed it possible for a Representative elected by one group to speak for another nonvoting group and that Representatives were in large degree still thought of as speaking for the whole population of a State. [FN10]

> FN10. It is surely beyond debate that the Constitution did not require the slave States to apportion their Representatives according to the dispersion of slaves within their borders. The above implications of the three-fifths compromise were recognized by Madison. See The Federalist, No. 54, discussed infra, pp. 546--547.
> Luce points to the 'quite arbitrary grant of representation proportionate to three fifths of the number of slaves' as evidence that even in the House 'the representation of men as men' was not intended. He states: 'There can be no shadow of question that populations were accepted as a measure of material interests--landed, agricultural, industrial, commercial, in short, property.' Legislative Principles (1930), 356--357.

There is a further basis for demonstrating the hollowness of the Court's assertion ****541** that Article I requires 'one man's vote in a congressional election * * * to be worth as much as another's,' ante, p. 530. Nothing that the Court does today will disturb the fact that although in 1960 the population of an average congressional district was 410,481, [FN11] the States of Alaska, Nevada, and Wyoming ***29** each have a Representative in Congress, although their respective populations are 226,167, 285,278, and 330,066. [FN12] In entire disregard of population, Art. I, s 2, guarantees each of these States and every other State 'at Least one Representative.' It is whimsical to assert in the face of this guarantee that an absolute principle of 'equal representation in the House for equal numbers of people' is 'solemnly embodied' in Article I. All that there is is a provision which bases representation in the House, generally but not entirely, on the population of the States. The provision for representation of each State in the House of Representatives is not a mere exception to the principle framed by the majority; it shows that no such principle is to be found.

> FN11. U.S. Bureau of the Census, Census of Population: 1960 (hereafter, Census), xiv. The figure is obtained by dividing the population base (which excludes the population of the District of Columbia, the population of the Territories, and the number of Indians not taxed) by the number of Representatives. In 1960, the population base was 178,559,217, and the number of Representatives was 435.

> FN12. Census, 1--16.

Finally in this array of hurdles to its decision which the Court surmounts only by knocking them down is s 4 of Art. I which states simply:

> 'The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.' (Emphasis added.)

The delegates were well aware of the problem of 'rotten boroughs,' as material cited by the Court, ante, pp. 533--534, and hereafter makes plain. It cannot be supposed that delegates to the Convention would have labored to establish a principle of equal representation only to bury it, one would have thought beyond discovery, in s 2, and omit all mention of it from s 4, which deals explicitly with the conduct of elections. Section 4 states without qualification that the state legislatures shall prescribe regulations for the conduct of elections for Representatives and, equally without

qualification, that Congress may make or *30 alter such regulations. There is nothing to indicate any limitation whatsoever on this grant of plenary initial and supervisory power. The Court's holding is, of course, derogatory not only of the power of the state legislatures but also of the power of Congress, both theoretically and as they have actually exercised their power. See infra, pp. 547--549. [FN13] It freezes upon both, for no reason other than that it seems wise to the majority of the present Court, a particular political theory for the selection of Representatives.

FN13. Section 5 of Article I, which provides that 'Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members,' also points away from the Court's conclusion. This provision reinforces the evident constitutional scheme of leaving to the Congress the protection of federal interests involved in the selection of members of the Congress.

III.

There is dubious propriety in turning to the 'historical context' of constitutional provisions which speak so consistently and plainly. But, as one might expect when the Constitution itself is free from ambiguity, the surrounding history makes what is already clear even clearer.

**542 As the Court repeatedly emphasizes, delegates to the Philadelphia Convention frequently expressed their view that representation should be based on population. There were also, however, many statements favoring limited monarchy and property qualifications for suffrage and expressions of disapproval for unrestricted democracy. [FN14] Such expressions prove as little on one side of this case as they do on the other. Whatever the dominant political philosophy at the Convention, one thing seems clear: it is in the last degree unlikely that most or even many of the delegates would have subscribed to the *31 principle of 'one person, one vote,' ante, p. 535. [FN15] Moreover, the statements approving population-based representation were focused on the problem of how representation should be apportioned among the States in the House of Representatives. The Great Compromise concerned representation of the States in the Congress. In all of the discussion surrounding the basis of representation of the House and all of the discussion whether Representatives should be elected by the legislatures or the people of the States, there is nothing which suggests *32 even remotely that the delegates had in mind the problem of districting within a State. [FN16]

FN14. I Farrand, Records of the Federal Convention (1911) (hereafter Farrand), 48, 86--87, 134--136, 288--289, 299, 533, 534; II Farrand 202.

FN15. 'The assemblage at the Philadelphia Convention was by no means committed to popular government, and few of the delegates had sympathy for the habits or institutions of democracy. Indeed, most of them intrepreted democracy as mob rule and assumed that equality of representation would permit the spokesmen for the common man to outvote the beleaguered deputies of the uncommon man.' Hacker, Congressional Districting (1963), 7--8. See Luce, Legislative Pinciples (1930), 356--357. With respect to apportionment of the House, Luce states: 'Property was the basis, not humanity.' Id., at 357.
Contrary to the Court's statement, ante, p. 535, no reader of The Federalist 'could have fairly taken * * * (it) to mean' that the Constitutional Convention had adopted a principle of 'one person, one vote' in contravention of the qualifications for electors which the States imposed. In No. 54, Madison said: 'It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States, is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants, as the State itself may designate. * * * In every State, a certain proportion of inhabitants are deprived of this right by the Constitution of the State, who will be included in the census by which the Federal Constitution apportions the representatives.' (Cooke ed. 1961) 369.

(Italics added.) The passage from which the Court quotes, ante, p. 535, concludes with the following, overlooked by the Court: 'They (the electors) are to be the same who exercise the right in every State of electing the correspondent branch of the Legislature of the State.' Id., at 385.

FN16. References to Old Sarum (ante, p. 533), for example, occurred during the debate on the method of apportionment of Representatives among the States. I Farrand 449--450, 457.

The subject of districting within the States is discussed explicitly with reference to the provisions of Art. I, s 4, which the Court so pointedly neglects. The Court states: 'The delegates referred to rotten borough apportionments in some of the state legislatures as the kind of objectionable governmental action that the Constitution should not tolerate in the election of congressional representatives.' Ante, p. 534. The remarks of Madison cited by the Court are as follows:

'The necessity of a Genl. Govt. supposes that the State Legislatures will sometimes fail or refuse to consult the common interest at the expense of their local conveniency or prejudices. The policy of referring the appointment of the House of ****543** Representatives to the people and not to the Legislatures of the States, supposes that the result will be somewhat influenced by the mode, (sic) This view of the question seems to decide that the Legislatures of the States ought not to have the uncontrouled right of regulating the times places & manner of holding elections. These were words of great latitude. It was impossible to foresee all the abuses that might be made of the discretionary power. Whether the electors should vote by ballot or viva voce, should assemble at this place or that place; should be divided into districts or all meet at one place, shd all vote for all the representatives; or all in a district vote for a number allotted to the district; these & many other points would depend on the Legislatures. (sic) and might materially affect the appointments. ***33** Whenever the State Legislatures had a favorite measure to carry, they would take care so to mould their regulations as to favor the candidates they wished to succeed. Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presumable that the Counties having the power in the former case would secure it to themselves in the latter. What danger could there be in giving a controuling power to the Natl. Legislature?' [FN17] (Emphasis added.)

FN17. II Farrand 240--241.

These remarks of Madison were in response to a proposal to strike out the provision for congressional supervisory power over the regulation of elections in Art. I, s 4. Supported by others at the Convention, [FN18] and not contradicted in any respect, they indicate as clearly as may be that the Convention understood the state legislatures to have plenary power over the conduct of elections for Representatives, Including the power to district well or badly, subject only to the supervisory power of Congress. How, then, can the Court hold that Art. I, s 2, prevents the state legislatures from districting as they choose? If the Court were correct, Madison's remarks would have been pointless. One would expect, at the very least, some reference to Art. I, s 2, as a limiting factor on the States. This is the 'historical context' which the Convention debates provide.

FN18. Ibid.

Materials supplementary to the debates are as unequivocal. In the ratifying conventions, there was no suggestion that the provisions of Art. I, s 2, restricted the power of the States to prescribe the conduct of elections conferred on them by Art. I, s 4. None of the Court's references ***34** to the ratification debate supports the view that the provision for election of Representatives 'by the People' was intended to have any application to the apportionment of Representatives within the States; in each instance, the cited passage merely repeats what the Constitution itself provides: that Representatives were to be elected by the people of the States. [FN19]

FN19. See the materials cited in notes 41--42, 44--45 of the Court's opinion, ante, p. 534. Ames' remark at the Massachusetts convention is typical: 'The representatives

are to represent the people.' II Elliot's Debates on the Federal Constitution (2d ed. 1836) (hereafter Elliot's Debates), 11. In the South Carolina Convention, Pinckney stated the the House would 'be so chosen as to represent in due proportion the people of the Union * * *.' IV Elliot's Debates 257. But he had in mind only that other clear provision of the Constitution that representation would be apportioned among the States according to populations. None of his remarks bears on apportionment within the States. Id., at 256--257.

In sharp contrast to this unanimous silence on the issue of this case when Art. I, s 2, was being discussed, there are repeated references to apportionment **544. and related problems affecting the States' selection of Representatives in connection with Art. I, s 4. The debates in the ratifying conventions, as clearly as Madison's statement at the Philadelphia Convention, supra, pp. 542--543, indicate that under s 4, the state legislatures, subject only to the ultimate control of Congress, could district as they chose.

At the Massachusetts convention, Judge Dana approved s 4 because it gave Congress power to prevent a state legislature from copying Great Britain, where 'a borough of but two or three cottages has a right to send two representatives to Parliament, while Birmingham, a large and populous manufacturing town, lately sprung up, cannot send one.' [FN20] He noted that the Rhode Island Legislature was 'about adopting' a plan which would *35 'Deprive the towns of Newport and Providence of their weight.' [FN21] Mr. King noted the situation in Connecticut, where 'Hartford, one of their largest towns, sends no more delegates than one of their smallest corporations,' and in South Carolina: 'The back parts of Carolina have increased greatly since the adoption of their constitution, and have frequently attempted an alteration of this unequal mode of representation but the members from Charleston, having the balance so much in their favor, will not consent to an alteration, and we see that the delegates from Carolina in Congress have always been chosen by the delegates of that city.' [FN22] King stated that the power of Congress under s 4 was necessary to 'control in this case'; otherwise, he said, 'The representatives * * * from that state (South Carolina), will not he chosen by the people, but will be the representatives of a faction of that state.' [FN23]

FN20. II Elliot's Debates 49.

FN21. Ibid.

FN22. Id., at 50--51.

FN23. Id., at 51.

Mr. Parsons was as explicit.

'Mr. PARSONS contended for vesting in Congress the powers contained in the 4th section (of Art. I), not only as those powers were necessary for preserving the union, but also for securing to the people their equal rights of election. * * * (State legislatures) might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially, and preserve and restore *36 to the people their equal and sacred rights of election. Perhaps it then will be objected, that from the supposed opposition of interests in the federal legislature, they may never agree upon any regulations; but regulations necessary for the interests of the people can never be opposed to the interests of either of the branches of the federal legislature; because that the interests of the people require that the mutual powers of that legislature should be preserved unimpaired, in order to balance the government. Indeed, if the Congress could never agree on any regulations, then certainly no objection to the 4th section can remain; for the regulations introduced by the state legislatures will be the governing rule of elections, until Congress can agree upon alterations.' [FN24] (Emphasis added.)

FN24. Id., at 26--27.

In the New York convention, during the discussion of s 4, Mr. Jones objected to congressional power to regulate elections because such power 'might be so construed as to deprive the states of an ****545** essential right, which, in the true design of the Constitution, was to be reserved to them.' [FN25] He proposed a resolution explaining that Congress had such power only if a state legislature neglected or refused or was unable to regulate elections itself. [FN26] Mr. Smith proposed to add to the resolution '* * * that each state shall be divided into as many districts as the representatives it is entitled to, and that each representative shall be chosen by a majority of votes.' [FN27] He stated that his proposal was designed to prevent elections at large, which might result in all the representatives being 'taken from a small part of the state.' [FN28] ***37** He explained further that his proposal was not intended to impose a requirement on the other States but 'to enable the states to act their discretion, without the control of Congress.' [FN29] After further discussion of districting, the proposed resolution was modified to read as follows:

FN25. Id., at 325.

FN26. Id., at 325--326.

FN27. Id., at 327.

FN28. Ibid.

FN29. Id., at 328.

'(Resolved) * * * that nothing in this Constitution shall be construed to prevent the legislature of any state to pass laws, from time to time, to divide such state into as many convenient districts as the state shall be entitled to elect representatives for Congress, nor to prevent such legislature from making provision, that the electors in each district shall choose a citizen of the United States, who shall have been an inhabitant of the district, for the term of one year immediately preceding the time of his election, for one of the representatives of such state.' [FN30]

FN30. Id., at 329.

Despite this careful, advertent attention to the problem of congressional districting, Art. I, s 2, was never mentioned. Equally significant is the fact that the proposed resolution expressly empowering the States to establish congressional districts contains no mention of a requirement that the districts be equal in population.

In the Virginia Convention, during the discussion of s 4, Madison again stated unequivocally that he looked solely to that section to prevent unequal districting:

'* * * (I)t was thought that the regulation of time, place, and manner, of electing the representatives, should be uniform throughout the continent. Some states might regulate the elections on the principles of equality, and others might regulate them otherwise. This diversity would be obviously unjust. Elections are regulated now unequally is some states, particularly South Carolina, with respect to Charleston, ***38** which is represented by thirty members. Should the people of any state by any means be deprived of the right of suffrage, it was judged proper that it should be remedied by the general government. It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution. And Considering the state governments and general government as distinct bodies, acting in different and independent capacities for the people, it was thought the particular regulations should be submitted to the former, and the general regulations to the latter. Were they exclusively ****546** under the control of the state governments, the general government might easily be dissolved. But if they be regulated properly by the state legislatures, the congressional control will very probably never be exercised. The power appears to me satisfactory, and as unlikely to be abused as any part of the Constitution.' [FN31] (Emphasis added.)

FN31. III Elliot's Debates 367.

Despite the apparent fear that s 4 would be abused, no one suggested that it could safely be deleted

because s 2 made it unnecessary.

In the North Carolina convention, again during discussion of s 4, Mr. Steele pointed out that the state legislatures had the initial power to regulate elections, and that the North Carolina legislature would regulate the first election at least 'as they think proper.' [FN32] Responding ***39** to the suggestion that the Congress would favor the seacoast, he asserted that the courts would not uphold nor the people obey 'laws inconsistent with the Constitution.' [FN33] (The particular possibilities that Steele had in mind were apparently that Congress might attempt to prescribe the qualifications for electors or 'to make the place of elections inconvenient.' [FN34]) Steele was concerned with the danger of congressional usurpation, under the authority of s 4, of power belonging to the States. Section 2 was not mentioned.

FN32. IV Elliot's Debates 71.

FN33. Ibid.

FN34. Ibid.

In the Pennsylvania convention, James Wilson described Art. I, s 4, as placing 'into the hands of the state legislatures' the power to regulate elections, but retaining for Congress 'self-preserving power' to make regulations lest 'the general government * * * lie prostrate at the mercy of the legislatures of the several states.' [FN35] Without such power, Wilson stated, the state governments might 'make improper regulations' or 'make no regulations at all.' [FN36] Section 2 was not mentioned.

FN35. Elliot's Debates 440--441.

FN36. Id., at 441.

Neither of the numbers of The Federalist from which the Court quotes, ante, pp. 534, 535 fairly supports its holding. In No. 57, Madison merely stated his assumption that Philadelphia's population would entitle it to two Representatives in answering the argument that congressional constituencies would be too large for good government. [FN37] In No. 54, he discussed the inclusion of slaves in the basis of apportionment. He said: 'It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation.' [FN38] This statement was offered simply to show that the slave ***40** population could not reasonably be included in the basis of apportionment of direct taxes and excluded from the basis of apportionment of representation. Further on in the same number of the Federalist, Madison pointed out the fundamental cleavage which Article I made between apportionment of Representatives among the States and the selection of Representatives within each State:

FN37. The Federalist, No. 57 (Cooke ed. 1961), 389.

FN38. Id., at 368.

'It is a fundamental principle of the proposed Constitution, that as the aggregate number of representatives allotted to the several States, is to be determined by a federal rule founded on the aggregate number of inhabitants, so the right of choosing this allotted number in each State is to be exercised by such part of the inhabitants, as the State itself may designate. The qualifications on which the right of suffrage depend, are not perhaps the same in any two ****547** States. In some of the States the difference is very material. In every State, a certain proportion of inhabitants are deprived of this right by the Constitution of the State, who will be included in the census by which the Federal Constitution apportions the representatives. In this point of view, the southern States might retort the complaint, by insisting, that the principle laid down by the Convention required that no regard should be had to the policy of particular States towards their own inhabitants; and consequently, that the slaves as inhabitants should have been admitted into the census according to their full number, in like manner with other inhabitants, who by the policy of other States, are not admitted to all the rights of citizens.' [FN39]

FN39. Id., at 369.

In the Federalist, No. 59, Hamilton discussed the provision of s 4 for regulation of elections. He justified Congress' power with the 'plain

proposition, that every *41 government ought to contain in itself the means of its own preservation.' [FN40] Further on, he said:

FN40. Id., at 398.

'It will not be alledged that an election law could have been framed and inserted into the Constitution, which would have been always applicable to every probable change in the situation of the country; and it will therefore not be denied that a discretionary power over elections ought to exist somewhere. It will, I presume, be as readily conceded, that there were only three ways, in which this power could have been reasonably modified and disposed, that it must either have been lodged wholly in the National Legislature, or wholly in the State Legislatures, or primarily in the latter, and ultimately in the former. The last mode has with reason been preferred by the Convention. They have submitted the regulation of elections for the Federal Government in the first instance to the local administrations; which in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety.' [FN41] (Emphasis added.)

FN41. Id., at 398--399.

Thus, in the number of the Federalist which does discuss the regulation of elections, the view is unequivocally stated that the state legislatures have plenary power over the conduct of congresssional elections subject only to such regulations as Congress itself might provide.

The upshot of all this is that the language of Art. I, ss 2 and 4, the surrounding text, and the relevant history *42 are all in strong and consistent direct contradiction of the Court's holding. The constitutional scheme vests in the States plenary power to regulate the conduct of elections for Representatives, and, in order to protect the Federal Government, provides for congressional supervision of the States' exercise of their power. Within this scheme, the appellants do not have the right which they assert, in the absence of provision for equal districts by the Georgia Legislature or the Congress. The constitutional right which the Court creates is manufactured out of whole cloth.

IV.

The unstated premise of the Court's conclusion quite obviously is that the Congress has not dealt, and the Court believes it will not deal, with the problem of congressional apportionment in accordance with what the Court believes to **548 be sound political principles. Laying aside for the moment the validity of such a consideration as a factor in constitutional interpretation, it becomes relevant to examine the history of congressional action under Art. I, s 4. This history reveals that the Court is not simply undertaking to exercise a power which the Constitution reserves to the Congress; it is also overruling congressional judgment.

Congress exercised its power to regulate elections for the House of Representatives for the first time in 1842, when it provided that Representatives from States 'entitled to more than one Representative' should be elected by districts of contiguous territory, 'no one district electing more than one Representative.' [FN42] The requirement was later dropped, [FN43] and reinstated. [FN44] In 1872, Congress required that Representatives 'be elected by districts composed of contiguous territory, and containing as *43 nearly as practicable an equal number of inhabitants, * * * no one district electing more than one Representative.' [FN45] This provision for equal districts which the Court exactly duplicates in effect, was carried forward in each subsequent apportionment statute through 1911. [FN46] There was no reapportionment following the 1920 census. The provision for equally populated districts was dropped in 1929, [FN47] and has not been revived, although the 1929 provisions for apportionment have twice been amended and, in 1941, were made generally applicable to subsequent censuses and apportionments. [FN48]

FN42. Act of June 25, 1842, s 2, 5 Stat. 491.

FN43. Act of May 23, 1850, 9 Stat. 428.

FN44. Act of July 14, 1862, 12 Stat. 572.

FN45. Act of Feb. 2, 1872, s 2, 17 Stat. 28.

FN46. Act of Feb. 25, 1882, s 3, 22 Stat. 5, 6; Act of Feb. 7, 1891, s 3, 26 Stat. 735; Act of Jan. 16, 1901, s 3, 31 Stat. 733, 734; Act of Aug. 8, 1911, s 3, 37 Stat. 13, 14.

FN47. Act of June 18, 1929, 46 Stat. 21.

FN48. Act of Apr. 25, 1940, 54 Stat. 162; Act of Nov. 15, 1941, 55 Stat. 761.

The legislative history of the 1929 Act is carefully reviewed in Wood v. Broom, 287 U.S. 1, 53 S.Ct. 1, 77 L.Ed. 131. As there stated:

'It was manifestly the intention of the Congress not to re-enact the provision as to compactness, contiguity, and equality in population with respect to the districts to be created pursuant to the reapportionment under the act of 1929.

'This appears from the terms of the act, and its legislative history shows that the omission was deliberate. The question was up, and considered.' 287 U.S., at 7, 53 S.Ct. at 2.

Although there is little discussion of the reasons for omitting the requirement of equally populated districts, the fact that such a provision was included in the bill as it was presented to the House, [FN49] and was deleted by the House after debate and notice of intention to do so, [FN50] ***44** leaves no doubt that the omission was deliberate. The likely explanation for the omission is suggested by a remark on the floor of the House that 'the States ought to have their own way of making up their apportionment when they know the number of Congressmen they are going to have.' [FN51]

FN49. H.R. 11725, 70th Cong., 1st Sess., introduced on Mar. 3, 1928, 69 Cong.Rec. 4054.

FN50. 70 Cong.Rec. 1499, 1584, 1602, 1604.

FN51. 70 Cong.Rec. 1499 (remarks of Mr. Dickinson). The Congressional Record reports that this statement was followed by applause. At another point in the debates, Representative Lozier stated that Congress lacked 'power to determine in what manner the several States exercise their sovereign rights in selecting their Representatives in Congress * * *.' 70 Cong.Rec. 1496. See also the remarks of Mr. Graham. Ibid.

Debates over apportionment in subsequent Congresses are generally unhelpful ****549** to explain the continued rejection of such a requirement; there are some intimations that the feeling that districting was a matter exclusively for the States persisted. [FN52] Bills which would have imposed on the States a requirement of equally or nearly equally populated districts were regularly introduced in the House. [FN53] None of them became law.

FN52. See, e.g., 85 Cong.Rec. 4368 (remarks of Mr. Rankin), 4369 (remarks of Mr. McLeod), 4371 (remarks of Mr. McLeod); 87 Cong.Rec. 1081 (remarks of Mr. Moser).

FN53. H.R. 4820, 76th Cong., 1st Sess.; H.R. 5099, 76th Cong., 1st Sess.; H.R. 2648, 82d Cong., 1st Sess.; H.R. 6428, 83d Cong., 1st Sess.; H.R. 111, 85th Cong., 1st Sess.; H.R. 814, 85th Cong., 1st Sess.; H.R. 8266, 86th Cong., 1st Sess.; H.R. 73, 86th Cong., 1st Sess.; H.R. 575, 86th Cong., 1st Sess.; H.R. 841; 87th Cong., 1st Sess.

Typical of recent proposed legislation is H.R. 841, 87th Cong., 1st Sess., which amends 2 U.S.C. s 2a to provide:

'(c) Each State entitled to more than one Representative in Congress under the apportionment provided in subsection (a) of this section, shall establish for each Representative a district composed of contiguous and compact territory, and the number of inhabitants contained within any district so established shall not vary more than 10 per centum from the number obtained by dividing the total population of such States, as established in the last decennial census, by the number of Representatives apportioned to such State under the provisions of subsection (a) of this section.

'(d) Any Representative elected to the Congress from a district which does not conform to the requirements set forth in subsection (c) of this section shall be denied his seat in the House of Representatives and the Clerk of the House shall refuse his credentials.'
Similar bills introduced in the current Congress are H.R. 1128, H.R. 2836, H.R. 4340, and H.R. 7343, 88th Cong., 1st Sess.

***45** For a period of about 50 years, therefore, Congress, by repeated legislative act, imposed on the States the requirement that congressional districts be equal in population. (This, of course, is the very requirement which the Court now declares to have been constitutionally required of the States all along without implementing legislation.) Subsequently, after giving express attention to the problem, Congress eliminated that requirement, with the intention of permitting the States to find their own solutions. Since then, despite repeated efforts to obtain congressional action again, Congress has continued to leave the problem and its solution to the States. It cannot be contended, therefore, that the Court's decision today fills a gap left by the Congress. On the contrary, the Court substitutes its own judgment for that of the Congress.

V.

The extent to which the Court departs from accepted principles of adjudication is further evidenced by the irrelevance to today's issue of the cases on which the Court relies.

Ex parte Yarbrough, 110 U.S. 651, 4 S.Ct. 152, 28 L.Ed. 274, was a habeas corpus proceeding in which the Court sustained the validity of a conviction of a group of persons charged with violating federal statutes [FN54] which made it a crime to conspire to deprive a citizen of his federal rights, and in particular the right to vote. The issue before the Court was whether or not the Congress had power to pass laws protecting ***46** the right to vote for a member of Congress from fraud and violence; the Court relied expressly on Art. I, s 4, in sustaining this power. Id., 110 U.S. at 660, 4 S.Ct. at 156. Only in this context, in order to establish that the right to vote in a congressional election was a right protected by federal law, did the Court hold that the right was dependent on the Constitution and not on the law of the States. Indeed, the Court recognized that the Constitution 'adopts the qualification' furnished by the States 'as the qualification of its own electors for members of Congress.' ****550** Id., 110 U.S. at 663, 4 S.Ct. at 158, 28 L.Ed. 274. Each of the other three cases cited by the Court, ante, p. 535, similarly involved acts which were prosecuted as violations of federal statutes. The acts in question were filing false election returns, United States v. Mosley, 238 U.S. 383, 35 S.Ct. 904, 59 L.Ed. 1355, alteration of ballots and false certification of votes, United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368, and stuffing the ballot box, United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341. None of those cases has the slightest bearing on the present situation. [FN55]

FN54. R.S. s 5508; R.S. s 5520.

FN55. Smiley v. Holm, 285 U.S. 355, 52 S.Ct. 397, 76 L.Ed. 795, and its two companion cases, Koenig v. Flynn, 285 U.S. 375, 52 S.Ct. 403, 76 L.Ed. 805; Carroll v. Becker, 285 U.S. 380, 52 S.Ct. 402, 76 L.Ed. 807, on which my Brother CLARK relies in his separate opinion, ante pp. 535--536, are equally irrelevant. Smiley v. Holm presented two questions: the first, answered in the negative, was whether the provision in Art. I, s 4, which empowered the 'Legislature' of a State to prescribe the regulations for congressional elections meant that a State could not by law provide for a Governor's veto over such regulations as had been prescribed by the legislature. The second question, which concerned two congressional apportionment measures, was whether the Act of June 18, 1929, 46 Stat. 21, had repealed certain provisions of the Act of Aug. 8, 1911, 37 Stat. 13. In answering this question, the Court was concerned to carry out the intention of Congress in enacting the 1929 Act. See id., 285 U.S. at 374, 52 S.Ct. at 402, 76 L.Ed. 795. Quite obviously, therefore, Smiley v. Holm does not stand for the proposition which my Brother CLARK derives from it. There

was not the slightest intimation in that case the Congress' power to prescribe regulations for elections was subject to judicial scrutiny, ante, p. 535, such that this Court could itself prescribe regulations for congressional elections in disregard and even in contradiction of congressional purpose. The companion cases to Smiley v. Holm presented no different issues and were decided wholly on the basis of the decision in that case.

***47** The Court gives scant attention, and that not on the merits, to Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432, which is directly in point; the Court there affirmed dismissal of a complaint alleging that 'by reason of subsequent changes in population the Congressional districts for the election of Representatives in the Congress created by the Illinois Laws of 1901 * * * lacked compactness of territory and approximate equality of population.' Id., 328 U.S. at 550--551, 66 S.Ct. at 1198. Leaving to another day the question of what Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663, did actually decide, it can hardly be maintained on the authority of Baker or anything else, that the Court does not today invalidate Mr. Justice Frankfurter's eminently correct statement in Colegrove that 'the Constitution has conferred upon Congress exclusive authority to secure fair representation by the States in the popular House * * *. If Congress failed in exercising its powers, whereby standards of fairness are offended, the remedy ultimately lies with the people.' 328 U.S., at 554, 66 S.Ct. at 1200, 90 L.Ed. 1432. The problem was described by Mr. Justice Frankfurther as '(a)n aspect of government from which the judiciary, in view of what is involved, has been excluded by the clear intention of the Constitution * * *.' Ibid. Mr. Justice Frankfurter did not, of course, speak for a majority of the Court in Colegrove; but refusal for that reason to give the opinion precedential effect does not justify refusal to give appropriate attention to the views there expressed. [FN56]

FN56. The Court relies in part on Baker v. Carr, supra, to immunize its present decision from the force of Colegrove. But nothing in Baker is contradictory to the view that, political question and other objections to 'justiciability' aside, the Constitution vests exclusive authority to deal with the problem of this case in the state legislatures and the Congress.

****551 *48** VI.

Today's decision has portents for our society and the Court itself which should be recognized. This is not a case in which the Court vindicates the kind of individual rights that are assured by the Due Process Clause of the Fourteenth Amendment, whose 'vague contours,' Rochin v. People of California, 342 U.S. 165, 170, 72 S.Ct. 205, 208, 96 L.Ed. 183, of course leave much room for constitutional developments necessitated by changing conditions in a dynamic society. Nor is this a case in which an emergent set of facts requires the Court to frame new principles to protect recognized constitutional rights. The claim for judicial relief in this case strikes at one of the fundamental doctrines of our system of government, the separation of powers. In upholding that claim, the Court attempts to effect reforms in a field which the Constitution, as plainly as can be, has committed exclusively to the political process.

This Court, no less than all other branches of the Government, is bound by the Constitution. The Constitution does not confer on the Court blanket authority to step into every situation where the political branch may be thought to have fallen short. The stability of this institution ultimately depends not only upon its being alert to keep the other branches of government within constitutional bounds but equally upon recognition of the limitations on the Court's own functions in the constitutional system.

What is done today saps the political process. The promise of judicial intervention in matters of this sort cannot but encourage popular inertia in efforts for political reform through the political process, with the inevitable result that the process is itself weakened. By yielding to the demand for a judicial remedy in this instance, the Court in my view does a disservice both to itself and to the broader values of our system of government.

***49** Believing that the complaint fails to disclose a constitutional claim, I would affirm the judgment below dismissing the complaint.

84 S.Ct. 526
376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481
(Cite as: 376 U.S. 1, 84 S.Ct. 526)

APPENDIX TO OPINION OF MR. JUSTICE HARLAN. [FN*]

State and Number Representatives [FN**]	Largest District	Smallest District	Difference Between Largest and Smallest Districts
Alabama (8)	.....	.....	.....
Alaska (1)	.....	.....	.....
Arizona (3)	663,510	198,236	465,274
Arkansas (4)	575,385	332,844	242,541
California (38)	588,933	301,872	287,061
Colorado (4)	653,954	195,551	458,403
Connectucut (6)	689,555	318,942	370,613
Delaware (1)	.....	.....	.....
Florida (12)	660,345	237,235	423,110
Georgia (10)	823,680	272,154	551,526
Hawaii (2)	.....	.....	.....
Idaho (2)	409,949	257,242	152,707
Illinois (24)	552,582	278,703	273,879
Indiana (11)	697,567	290,596	406,971
Iowa (7)	442,406	353,156	89,250
Kansas (5)	539,592	373,583	166,009
Kentucky (7)	610,947	350,839	260,108
Louisiana (8)	536,029	263,850	272,179
Maine (2)	505,465	463,800	41,665
Maryland (8)	711,045	243,570	467,475
Massachusetts (12)	478,962	376,336	102,626
Michigan (19)	802,994	177,431	625,563
Minnesota (8)	482,872	375,475	107,397
Mississippi (5)	608,441	295,072	313,369
Missouri (10)	506,854	378,499	128,355
Montana (2)	400,573	274,194	126,379
Nebraska (3)	530,507	404,695	125,812
Nevada (1)	.....	.....	.....
New Hampshire (2)	331,818	275,103	56,715
New Jersey (15)	585,586	255,165	330,421
New Mexico (2)	.....	.....	.....
New York (41)	471,001	350,186	120,815
North Carolina (11)	491,461	277,861	213,600
North Dakota (2)	333,290	299,156	34,134
Ohio (24)	726,156	236,288	489,868
Oklahoma (6)	552,863	227,692	325,171
Oregon (4)	522,813	265,164	257,649
Pennsylvania (27)	553,154	303,026	250,128
Rhode Idland (2)	459,706	399,782	59,924
South Carolina (6)	531,555	302,235	229,320

South Dakota (2)	497,669	182,845	314,824
Tennessee (9)	627,019	223,387	403,632
Texas (23)	951,527	216,371	735,156
Utah (2)	572,654	317,973	254,681
Vermont (1)	.....	.....	.....
Virginia (10)	539,618	312,890	226,728
Washington (7)	510,512	342,540	167,972
West Virginia (5)	422,046	303,098	118,948
Wisconsin (10)	530,316	236,870	293,446
Wyoming (1)	.....	.....	.....

FN** 435 in all.

FN* The populations of the districts are based on the 1960 Census. The districts are those used in the election of the current 88th Congress. The populations of the districts are available in the biographical section of the Congressional Directory, 88th Cong., 2d Sess.

****552 *50** Mr. Justice STEWART.

I think it is established that 'this Court has power to afford relief in a case of this type as against the objection that the issues are not justiciable,' [FN*] and I cannot subscribe to any possible implication ****553** to the contrary which ***51** may lurk in Mr. Justice HARLAN'S dissenting opinion. With this single qualification I join the dissent because I think Mr. Justice HARLAN has unanswerably demonstrated that Art, I, s 2, of the Constitution gives no mandate to this Court or to any court to ordain that congressional districts within each State must be equal in population.

FN* The quotation is from Mr. Justice Rutledge's concurring opinion in Colegrove v. Green, 328 U.S., at 565, 66 S.Ct. at 1208, 90 L.Ed. 1432.

376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481

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